

A critical examination of South Africa's application of the expanded OAU refugee definition: Is adequate protection being offered within the meaning of the 1969 OAU Refugee Convention?

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I, Tal Hanna Schreier, hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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I. Introduction

The 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa¹ (hereinafter the "OAU Convention") is, to date, the only legally binding regional refugee treaty. In 1994, a symposium of the OAU member states reaffirmed 'its belief in the continuing validity of the 1969 OAU Convention as the cornerstone of refugee protection in Africa,'² thereby confirming its significance. The OAU Convention's genesis stemmed from the 1951 UN Refugee Convention Relating to the Status of Refugees³ (hereinafter the "1951 Convention") limited use for dealing with the specific refugee situation in Africa. Its most celebrated feature has been its expansion of the refugee definition to include those persons who are not only fleeing from individualized persecution, rather those who are also fleeing from 'external aggression, occupation, foreign domination or events seriously disturbing public order in a part or a whole'⁴ of their country.

South Africa's refugee protection system is still in its nascent stage of development, as it commenced only after the demise of Apartheid regime in the early 1990s. In 1995 and 1996 South Africa signed the OAU Convention and the 1951 Convention, respectively. Shortly thereafter, South Africa enacted its Refugees Act 130 of 1998, which became operational in the year 2000. The Refugees Act incorporates both the 1951 Convention and OAU refugee definitions, thus providing for *expanded* refugee protection in the Republic.

The OAU refugee definition and the OAU Convention as a whole has not been subject to much interrogation, neither has it been the subject of much international jurisprudence. In comparison with the amount of soft law, case law and academic literature which has developed around the 1951 Refugee Convention, its refugee

¹ 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa Adopted on 10 September 1969 by the Assembly of Heads of State and Government, CAB/LEG/24.3., *entered into force* on 20 June 1974 (hereinafter the "OAU Convention")

² *The Addis Ababa Document on Refugees and Forced Population Displacements in Africa* Adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa 8-10 September 1994 Addis Ababa at par 3.

³ 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954 and Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* on 4 October 1967 (hereinafter the "1951 Convention")

⁴ Art I(2), OAU Convention

definition and its legal principles, there is little of same in terms of the OAU Convention to the extent that '...today, domestic law is really the only theatre figuring significant refugee law developments in Africa.'⁵

The above can unquestionably be said as well of South Africa's analysis of the OAU refugee definition. To date, there exist no published Refugee Appeal Board decisions, or reported or unreported South African High Court decisions that have interpreted the OAU refugee definition. In general, refugee law jurisprudence in South Africa is thin, save for a number of mainly asylum procedure-related cases. Moreover, reliable statistics from the South African Department of Home Affairs or other sources, which may detail the extent or degree of the application of the OAU refugee definition in South Africa refugee practice, are not readily available, if non-existent.

In analyzing the various elements of the OAU refugee definition as well as the approach to refugee determination in the country, the researcher will attempt to ascertain whether in the South African context, this expanded refugee definition is providing the necessary protection to certain individuals, as envisaged by the OAU Convention. A detailed analysis of selected Refugee Appeal Board decisions on topic will assist in determining the current level of protection afforded by the South African refugee regime in this regard.

As background, it is relevant to note that the researcher's objectives, in terms of her intended research methodology,⁶ were not met with complete success. In this regard, the researcher initially set out to obtain a wide sampling of South African Refugee Appeal Board decisions, however, despite repeated attempts at securing

⁵ G Okoth Obbo 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' in *Refugee Survey Quarterly* Vol 20 No 1 2001 79 at 105

⁶ Due to the requirement of brevity, a detailed methodology section has not been included in this paper. It was intended, according to the original research proposal that 'the researcher review a number of selected Refugee Appeal Board decisions to determine the standard of protection afforded in South Africa in terms of the OAU refugee definition. If permitting, the researcher will conduct semi-structured interviews with Refugee Appeal Board judges and possibly Refugee Status Determination Officers of the Department of Home Affairs, Refugee Affairs.... Where possible, the author will also review Home Affairs and United Nations High Commissioner for Refugees (UNHCR) statistics, and examine statements and actions of government officials to ascertain the degree to which the OAU definition is serving its intended purpose.'

same, was only able to review a small number of Appeal Board decisions to review. While it may be assumed that Appeal Board's interpretation and application of the OAU definition is consistent in all of its decisions, without having reviewed a larger number of decisions, this conclusion cannot be made with certainty. A similar lack of success in obtaining relevant statistics from the South African Department of Home Affairs was a further challenge to the intended comprehensive review of this subject matter. Lastly, due to the scope of this research, structured interviews with government officials were also not conducted. Despite the above, the researcher has thoroughly reviewed all other sources and materials relevant to the subject and the following dissertation provides an in-depth analysis of South Africa's interpretation of the OAU refugee definition and its method of application of same.

This paper will begin by providing background information on the development of the OAU Convention and its expanded refugee definition. This will include a brief comparison of the OAU refugee definition to that of the 1951 refugee definition and an evaluation of whether the OAU definition provides for prima-facie or group refugee determination. The paper will then scrutinize the OAU refugee definition, by analyzing each element of the definition in order to better comprehend its meaning and how it should be applied accordingly. Thereafter, the paper will focus on South Africa's legal position *vis a vis* the OAU refugee definition. This will include a review of South Africa's refugee protection history, an examination of the way in which the OAU refugee definition is seemingly applied by first instance decision-makers in the asylum process, and a review of the Refugee Appeal Board's interpretation of the OAU definition. Finally, an academic discussion of the potential application of the OAU definition to the current situation of Zimbabwean forced migrants will be undertaken before the paper concludes, with its overall analysis of how South Africa is applying the OAU refugee definition and whether or not it is adhering to the provisions of the OAU Convention.

II. The OAU Convention and its Expanded Refugee Definition

Nearly forty years on, the OAU refugee definition remains an essential means of providing protection to large numbers of persons who are forced to flee their countries of origin due to indiscriminate widespread disruption of public order or

generalized violence. This part of the paper will review the notion of the expanded definition in refugee law. In this regard, it will briefly examine the 1951 refugee definition with a purpose of providing a comparative backdrop to the OAU refugee definition, and thereafter examine the motivations for the development of the OAU refugee definition, the complementary character of the OAU definition and some of the salient and innovative aspects of the definition.

(i) *As compared to the 1951 refugee definition*

The 1951 Convention definition of a refugee is still the primary standard of refugee status today. It states the following:

'For the purposes of the present Convention, the term "refugee", shall apply to any person who....as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'⁷

The 1951 Convention refugee definition limited the scope of mandatory international protection to refugees who were forced to flee due to a pre-1951 event that occurred within Europe. Despite the removal of these temporal and geographical limitations, which was achieved by the 1967 Protocol Relating to the Status of Refugees⁸, the 1951 refugee definition still means that 'most Third World refugees remain *de facto* excluded, as their flight is more often prompted by natural disaster, war or broadly based political and economic turmoil than by persecution...

⁷ Art 1(A)(2), 1951 Convention

⁸ 1967 *Protocol Relating to the Status of Refugees* 606 U.N.T.S. 8791, entered into force on 4 October 1967 at Articles 1(2) and (3) states, respectively, that '...for the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951..." and the words "...as a result of such events", in article 1A(2) were omitted...' and '...the present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.'

[since while] these phenomena undoubtedly may give rise to genuine fear and hence the need to seek safe haven from one's home, refugees whose flight is not motivated by persecution rooted in civil or political status are excluded from the rights regimes established by the [1951] Convention.⁹

In examining the 1951 Convention definition as contrasted to the OAU definition, it is relevant to recognize the reasoning or motivations behind the original refugee definition. According to James Hathaway, 'the strategic dimension of the [1951 refugee] definition was derived from successful efforts of Western states to give priority in protection matters to persons whose flight was motivated by pro-Western political values.'¹⁰ In this regard, the 1951 refugee definition suggests that the bond of protection between citizen and state has been severed¹¹ – either because the state is the persecutor or the state is unable or unwilling to provide protection to the individual who is being or may be persecuted by another agent of persecution. Furthermore, the 1951 refugee definition contains a 'quality of deliberateness'¹² since an asylum seeker must prove that he or she faces persecution as a result of being specifically targeted due to one of the enumerated grounds, being either race, religion, nationality, membership of a particular social group or political opinion. This aspect of deliberate targeting of an individual on the part of the agent of persecution supports the individualistic nature of or the subjective concept of a refugee according to the 1951 definition.

According to the 1951 definition, which 'was carefully phrased to include only persons who have been disenfranchised by their state on the basis of race, religion, nationality, membership in a particular social group or political opinion,'¹³ persons are provided protection if they are the victims of civil or political oppression. On

⁹ JC Hathaway *The Law of Refugee Status* (1991) at 10-11

¹⁰ *Ibid* at 6

¹¹ A Shacknove 'Who is a Refugee?' in *Ethics* (January 1995) Vol 95 No 2 274 at 275 confirms that the theoretical basis for the refugee definition is 'predicated on an implicit argument (or conception) that a) a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis of society; b) in the case of the refugee, this bond has been severed; c) persecution and alienage are always the physical manifestations of this severed bond; and d) these manifestations are the necessary and sufficient conditions for determining refugeehood.'

¹² M Rankin 'Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on' UNHCR Working Paper No. 113 (April 2005) accessed at <http://www.unhcr.org/research/RESEARCH/425f71a42.pdf> on 2 January 2008 at 7

¹³ Hathaway *op cit* n 9 at 8

the other hand, socio-economic rights are not protected in that those persons who are 'denied even such basic rights as food, health care, or education, are excluded from the international refugee regime (unless that deprivation stems from civil or political status.)'¹⁴

(ii) *A ground-breaking regional complement*

The Preamble to the OAU Convention states that the Convention '...shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.'¹⁵ In addition to being considered as supplementary to the 1951 Convention, the OAU Convention and especially its expanded definition of refugee is considered a landmark in refugee law.¹⁶

The adoption of the OAU Convention reflected 'more closely the realities of Africa during a period of violent struggle for self-determination and national development'¹⁷ and the need to develop a refugee regime that would provide protection to the type of forced migrants that are found on the continent. While this conclusion is likely correct, it is important to keep in mind the fact, as George Okoth-Obbo fervently states, that academic and legal analysis of the meaning or intentions of the OAU Convention drafters is seriously challenged due to the 'frustrating dearth of publicly available original records on the Convention.'¹⁸ In this regard, in his seminal work *Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa*, Okoth-Obbo based on his thorough review of available sources, concludes that in fact the 'motive forces of the [OAU] Convention were essentially political, and then particularly security-driven, even if the animation was to be caste [sic] and

¹⁴ Ibid

¹⁵ OAU Convention, Preamble

¹⁶ EO Awuku 'Refugee Movements in Africa and the OAU Convention on Refugees' in *Journal of African Law* Vol 39 No 1 (1995) 79 at 86

¹⁷ E Arboleda 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' in *International Journal of Refugee Law* Vol 3 No 2 185 at 186

¹⁸ Okoth-Obbo op cit n5 at 85. The author further states, at 86, that no systematic travaux préparatoires were ever published; that very few original documents exist; and that mainly secondary sources can be found. Research in this area has tended to be based on two pioneer works that were published shortly after the Convention's adoption, and '...several subsequent studies have fully relied upon key formulations in these papers without further research into the picture which primary sources may portray, even if this would be merely for the purposes of verification.'

organized in legal terms.¹⁹ Okoth-Obbo confirms that the fact the OAU definition came out of a fundamental irrelevance of the 1951 Convention in relation to Africa's refugee realities is a 'gross overstatement,' and that actually the OAU Convention was developed to address the problem of subversive activities of refugees in countries of asylum and the temporal limitation that existed as a result of the 1951 Convention.²⁰

Despite the foregoing, the OAU Convention's provisions on asylum, as found in Article II of the Convention, 'are considered by many scholars as among its most important contribution to refugee jurisprudence in general.'²¹ These provisions include the obligation of member states to 'use their best endeavours, consistent with their respective legislation, to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin;'²² and, its far-reaching provision on *non-refoulement*, which states that: '...no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I paragraphs 1 and 2.'²³ In addition, the OAU Convention is recognized as the first international legal instrument, which codified principles on the safe and humane voluntary repatriation of refugees to their country of origin.²⁴

Notwithstanding the above-noted actual motivations for the development of the OAU Convention, its expanded refugee definition is still considered to be an original and forward-looking contribution to refugee jurisprudence. In this regard, according to the OAU Convention:

'...the term refugee shall *also* apply to every person who, owing to external aggression, occupation, foreign

¹⁹ Ibid at 90. The author provides many examples of provisions in the OAU Convention that are geared to these objectives, such as the stipulation prohibiting subversive activities.

²⁰ Ibid at 109-110. See also I Jackson *The Refugee Concept in Group Situations* (1999) at 178.

²¹ Ibid at 88. See Conclusions section of this paper for a brief discussion of whether South Africa is upholding these important legal obligations.

²² OAU Convention, Art II(1)

²³ OAU Convention, Art II(3)

²⁴ OAU Convention, Art V

domination or events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his country of origin or nationality [emphasis added].²⁵

As opposed to the 1951 definition, which requires a refugee to hold a well-founded fear of persecution,²⁶ there is no such requirement in the OAU refugee definition. The focus in determining refugee status according to the OAU definition involves 'an examination of whether the facts of a specific situation fit within the definition's specified causes of flight.'²⁷

As such, the significance of the OAU definition is that it attempts to link the refugee definition with the actual cause of the refugee problems. In this regard, the OAU definition does not refer to the subjective fear of the individual, but rather of objective facts: the 'unbearable and dangerous conditions which set entire populations on the move.'²⁸ As a result of the absence of individual characteristics in the OAU refugee definition, it indeed more readily conforms to the realities of Africa and other parts of the developing world, in which people are displaced as a result of generalized threats, law and order in a society their societies being disrupted and the failure or inability of the government of their country of origin to protect them. In this regard, it may be stated that the OAU extended refugee definition represents more of a '...communitarian philosophy of asylum which focuses on the nature of the community...[in that the] definition is premised on the position that the community itself may constitute the threat.'²⁹ The fact that the OAU definition removes the subjective standard of whether or not a refugee can be said to fear persecution represents a significant conceptual adaptation of the 1951 refugee definition. This aspect of the OAU *expanded* refugee definition is

²⁵ OAU Convention, Art I(2). The OAU Convention firstly, in Art I(1) repeats the 1951 Convention refugee definition (with the 1967 Protocol's addition, which removed the geographical and temporal limitations from same) and then includes this additional definition of a refugee.

²⁶ The basis of which has both a subjective component and an objective component, which is proven through an examination of the objective country conditions of the refugee's country of origin or nationality.

²⁷ Rankin op cit n12 at 5

²⁸ MR Rwelamira 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' in *IJRL* (1989) 557 at 559

²⁹ Rankin op cit n12 at 7

noteworthy in that it clearly widens the refugee definition since the definition may even '...include within its scope accidental situations not necessarily based on deliberate state action.'³⁰

Despite this *objective* aspect of the OAU refugee definition, this definition, as Hathaway points out, does not imply that 'victims of natural disasters or economic misfortune should become the responsibility of the international community.'³¹ Rather, Hathaway refers to the ground-breaking OAU refugee definition, in general terms, as being applicable to 'all persons compelled to flee across national borders by reason of *any man-made disaster* [emphasis added].'³² This is an important point to keep in mind, as this paper will later on turn its attention to defining the enumerated 'OAU events' that compel individuals to take flight. In this regard, the way in which one defines these events, in particular *events seriously disturbing public order* may lead to greater recognition and hence protection of refugees in terms of the OAU definition.

According to Hathaway, the OAU refugee definition contains four significant and unprecedented adaptations to the 1951 Convention, which were necessary in order to specifically cater for the types of displacement of people in the African context. Firstly, the OAU definition acknowledges that fundamental violations of human rights or forms of abuse may occur not only due to the calculated acts of government, but also due to external aggression, occupation, foreign domination or a serious disturbance of public order. This modification '...recognizes the need to examine a refugee claim from the perspective of the *de facto*, rather than the formal, authority structure from within the country of origin.'³³

Secondly, the refugee definition contained in the OAU Convention acknowledges the concept of group disfranchisement, in that the definition confirms the legitimacy of refugees' flight as a result of circumstances of generalized danger.³⁴ This in turn

³⁰ Okoth-Obbo op cit n5 at 112

³¹ Hathaway op cit n9 at 17

³² Ibid

³³ Ibid

³⁴ Ibid at 18

has lead to the qualified acceptance of the notion of refugee group determination.³⁵ However, in this regard, and as mentioned above, Okoth-Obbo warns of the following:

'Most of the literature on the OAU Convention is dominated by the impression that it provides the facility for dealing more manageably with refugee status in [mass influx] situations. Nothing could be father from the truth. In relation to an elaborate or even only essential set of standards pursuant to which the *process* of refugee status determination could be devised and status determination operations better structures, organized and delivered in *mass influx* or so-called *group situations*, the OAU Convention is entirely silent.'³⁶

Thirdly, according to Hathaway, the expanded OAU refugee definition, allows for the possibility that the underlying motivation or rationale for the anticipated harm may be indeterminate. Hathaway explains that:

'...so long as a person is "compelled" to seek refuge because of some anticipated serious disruption of public order, she need not be in a position to demonstrate any linkage between her personal status (or that of some collectivity of which she is a member) and the impending harm. Because the African standard emphasizes assessment of the gravity of the disruption of public order rather than the motives for flight, individuals are largely able to decide for themselves when harm is sufficiently proximate to warrant flight.'³⁷

Lastly, the fact that the OAU definition includes the phrase *in either part or the whole of*, referring to the refugee's country of origin, is another important adaptation to the original definition, according to Hathaway. The 1951 definition suggests that an individual must necessarily first seek protection within a safe part of his or her own country of origin³⁸, if such an area exists and it is reasonable for

³⁵ Ibid at 20

³⁶ Okoth Obbo op cit n5 at 100

³⁷ Hathaway op cit n9 at 18

³⁸ In refugee determination procedures, this consideration is most commonly known as the Internal Flight Alternative (IFA), or the Internal Protection Alternative. According to the UNHCR's *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* 23 July 2003 CHR/GIP/03/04 at 2 par 1 and 3, the IFA is an approach that has been taken

the person to get there, before seeking refugee protection in a different country.³⁹ The OAU definition, by virtue of the inclusion of this phrase, does not contain this requirement.

(iii) *Prima facie refugee determination*

The concept of prima facie refugee determination refers to the provisional granting of refugee status to a person or persons without the formal requirement of conducting an individual refugee status determination to establish whether or not the displaced person(s) qualify. Rather than the granting of refugee status based on a legal definition, prima facie refugee determination is essentially a device or a method to enable, in urgent situations such as a mass-influx, appropriate protection measures to be taken when individual refugee status determination procedures are impractical. According to the UNHCR, in effect it is the number of refugees that triggers the mechanism for prima facie refugee status.⁴⁰

Due to the fact that refugees in Africa tend to move in large groups, the type of individual case by case application of the refugee definition as contemplated by the 1951 Convention was not thought to be practical in the African context. Prima facie or group refugee determination based on evidence of lack of protection in the refugee's country of origin⁴¹, was an appropriate solution that was *implied* by the

by various jurisdictions, with consequently divergent results, rooted either in the 'well-founded fear of being persecuted' clause or in the 'unwilling or unable to avail himself of the protection of that country' clause of the 1951 definition. See later in paper for a further discussion of the IFA.

³⁹ Hathaway op cit n9 at 18-9, where the author points to three sensible reasons for this adaptation to the refugee definition: one being issues of distance and unavailability of escape routes due to underdeveloped infrastructure or inadequate financial resources; the second being that political instability and rapid shifts of power may mean that 'what is a safe region today may be dangerous tomorrow;' and the third relates to the artificial Colonial borders in Africa, which may mean that family or ethnic ties stretch across national boundaries.

⁴⁰ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1992) at 13 par 44, where it is stated: 'While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations, the need to provide assistance is extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to the so-called group determination of refugee status, whereby each member of the group is regarded as prima facie (i.e. in the absence of evidence to the contrary) as a refugee.'

⁴¹ Such as establishing that law and order has broken down or that civil war has erupted or that foreign aggression has occurred in a country is reasonably easy.

OAU refugee definition.⁴² As established above, however, the OAU Convention does not actually provide for this mechanism. In fact, the 'OAU Convention is neither the source, nor the authority for "prima facie" or "group determination" of refugee status...[as] nowhere in its definition of a refugee or the provisions on asylum are either concepts mentioned.'⁴³

The discussion relating to prima facie refugee determination is particularly relevant to the South African refugee status determination procedure, in that the research conducted for this paper indicates that prima facie refugee determination is, to an extent, occurring within the country's refugee status determination process, despite the fact that the country's governing refugee legislation does not provide for same. Rather, South African law provides for an individualized refugee status determination hearing that is required to take place for every asylum seeker who applies for asylum in South Africa. Reliance on the existence of the OAU refugee definition in the South African legislation likely accounts for this practice, amongst other reasons. This issue will be examined in further detail in the South African section below. Prior to doing so, the paper will proceed to scrutinize the OAU refugee definition by examining each element of same in an attempt to determine its precise legal meaning and consequently the manner in which the definition should be applied, in order to ensure that those requiring protection receive it.

III. Analyzing the OAU Refugee Definition

(i) Introduction

With the adoption of the OAU Convention, its expanded refugee definition incorporated new terminology never before used in international law. The use of such new terminology 'reflected the urgency of responding to the African reality,...established an important precedent in international law,...responded to obvious humanitarian concerns, and sought to provide a practical solution to the problem of determining refugee status.'⁴⁴ According to M Rankin, however, the

⁴² G Goodwin Gill *The Refugee in International Law 2nd Ed* (1991) at 78-79

⁴³ Okoth-Obbo op cit n5 at 120

⁴⁴ Arboleda op cit n17 at 195

OAU refugee definition is significantly vague and ambiguous, even though there is 'an intuitive sense to its meaning'.⁴⁵ In this regard, Rankin comments that the 'extended definition raises a number of serious interpretive problems ranging from assumptions about its nature to more specific concerns about its content'.⁴⁶ In 2005, Rankin undertook a comprehensive study to propose legally relevant criteria for interpreting each element of the OAU refugee definition, which is the only work currently in existence found by the researcher that assumed such an endeavour.

In order to determine whether South African decision-makers are correctly applying the OAU refugee definition, it is important to initially dissect and attempt to define the various elements of the definition. Unfortunately, due to lack of publicly-available *travaux préparatoires* or primary sources regarding the formulation of the OAU Convention, limited evidence of state practice, and a scarcity of existing jurisprudence dealing with the application of the OAU refugee definition in other countries, the task of interpreting the definition is a difficult one.

With the above in mind, the principles of treaty interpretation as found in the Vienna Convention on the Law of Treaties,⁴⁷ (hereinafter the "Vienna Convention") which were held to be part of customary international law by the International Court of Justice in the 1994 case of *Chad v Libya*,⁴⁸ are of limited use. According to the Vienna Convention, interpretation should begin with the text of the treaty. More specifically, Article 31(1) of the Vienna Convention states that '...a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'⁴⁹ In

⁴⁵ Rankin Op cit n12 at 1

⁴⁶ Ibid at 11

⁴⁷ *Vienna Convention on the Law of Treaties* 115 UNTS 331 (hereinafter "Vienna Convention")

⁴⁸ *Libya v Chad case* (1994) *ICJ Reports* 4 at par 41.

⁴⁹ Art 31(1), Vienna Convention. The subsequent subsections in this Article provide further instructions as to how to establish the context of a treaty, as well as, for example directions regarding any agreements made between the parties to the treaty. More specifically, Art 31(2) states that 'the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of

addition, recourse to 'supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31'⁵⁰ is provided for in Article 32 of the Vienna Convention. As stated above, however, the concern remains that there is little existing information to guide researchers, in terms of the OAU Convention's drafters' preparatory work and hence their intentions. This is particularly so with regard to the OAU Convention's refugee definition.

(ii) *Scope of application of the definition*

Prior to analysing each of its elements, it is necessary to determine to whom the OAU refugee definition specifically applies. This question arises because of the definition's words *every person*, which need to be considered. According to Rankin, some African States view the OAU refugee definition as applying only to Africans. The basis for this position may possibly be found in the Convention's main objective, that as a regional complement to the 1951 Convention, it was created in order to meet the specific needs of African refugees, which may suggest an intention on the part of its drafters to limit its territorial application to Africa.⁵¹ However, the plain meaning of the words *every person* clearly points to a more inclusive interpretation, meaning that the definition's application ought to be universal. Furthermore, the 1951 Convention's universal application, stemming from the same inclusive wording provides evidence of the requirement of similar application. This broader line of interpretation is also more consistent with the expanded definition's aim to extend asylum rather than to refuse it.⁵²

In addition, as commented further by Rankin, an inclusive interpretation of the words *every person* is more consistent to the purpose and intention of refugee protection in general. In this regard, it is a generally accepted international legal principle that 'presence within State territory is a juridically relevant fact sufficient

international law applicable in the relations between the parties. 4.A special meaning shall be given to a term if it is established that the parties so intended.

⁵⁰ Vienna Convention, Art 32

⁵¹ Rankin op cit n12 at 12

⁵² Ibid at 13

in most cases to establish the necessary link with authorities.⁵³ South African law conforms to this inclusive position. For example, in the case of *Patel v Minister of Home Affairs*⁵⁴ the court held that, as a result of the wording of the Bill of Rights⁵⁵ in which most of the rights are for the benefit of 'everyone,' aliens have the same rights under the Constitution that citizens have, unless the contrary emerges from the Constitution. Furthermore, this inclusive position is found in South African refugee law, which has been informed by the country's advanced Constitution. Section 10 of South Africa's Bill of Rights of the Constitution provides that: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'⁵⁶ In the case of *Minister of Home Affairs and Others v Watchenuka and Another*,⁵⁷ the Supreme Court of South Africa held that the term everyone included asylum seekers.⁵⁸

According to the above-noted principle of law and related jurisprudence, therefore, one can assert that an '...inclusive reading of the extended refugee definition is a more consistent interpretation than an exclusive reading....[and it is still] relevant to a principled application of the extended definition.'⁵⁹ L de la Hunt, a noted South African refugee advocate, supports this inclusive interpretation, claiming that the OAU definition should 'apply universally and equally to all applicants, regardless of their country of origin,'⁶⁰ Notwithstanding this point, the actual position that the South African government takes in relation to the scope of the OAU refugee definition is what remains relevant to the within study. In this regard, it is necessary to examine what transpires in South Africa's refugee determination

⁵³ Rankin op cit n12 at 11 n81, I Brownlie, *Principles of Public International Law* 4th ed (1990) at 119.

⁵⁴ *Patel v Minister of Home Affairs* 2000 (2) SA 343 (D) 3491

⁵⁵ Chapter 2, Bill of Rights, *Constitution of the Republic of South Africa Act No.108 of 1996*

⁵⁶ Ibid at Section 10

⁵⁷ *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA). This case dealt with a challenge to the original prohibition (in Refugee Regulations [Forms and Procedure] 2000, which were promulgated on 6 April 2000 under Government Notice R 366 in Government Gazette 21075 of 6 April 2000) against asylum seekers in South Africa from seeking employment and being able to study for the first 180 days, while their asylum applications were being considered.

⁵⁸ *Watchenuka case* Ibid at par 25 the Court stated: 'Human dignity has no nationality. It is inherent in all people - citizens and non-citizens alike - simply because they are human. While that person happens to be in this country, for whatever reason, it must be respected, and is protected, by s 10 of the Bill of Rights.'

⁵⁹ Rankin op cit n12 at 14

⁶⁰ L de la Hunt 'Refugee Law in South Africa: Making the Road of the Refugee Longer' in *A Reference Guide to Refugee Law and Issues in Southern Africa* (2002) at 34.

procedure, a topic that will be reviewed in further detail in the relevant South African section below.

(iii) *The OAU definition's enumerated events*

The fact that four specific grounds, or particular harmful events that may compel someone to take flight, are enumerated in the OAU definition indicates that the Convention's drafters seemingly intended to be quite explicit about the types of events that can cause flight and thereby justify the granting of refugee status refugee status. While these enumerated grounds also reflect the definition's broadness and flexibility, this does not necessarily assist with understanding the true scope of these events.

For example, similar to Hathaway's above-noted interpretation, according to MR Rwelamira, the grounds of *external aggression, occupation, foreign domination or events seriously disturbing public order* are 'designed to cover a variety of *man-made* conditions which do not allow people to reside safely in their countries of origin [emphasis added].'⁶¹ Meanwhile, a plain reading of the phrase *events seriously disturbing public order* does not necessarily indicate why an environmental catastrophe such as drought or earthquake cannot seriously disturb the public order.

In light of the above, it is necessary to seek interpretation and attempt to define these enumerated events. The focus of the below section will primarily be upon the 'catch-all' phrase of *events seriously disturbing public order*, as this is the broader category as compared to the three other events, which can be said to comprise a group of war-like situations.

a. *External aggression, occupation and foreign domination*

As E Arboleda noted in the above quote, the inclusion of the events *external aggression, occupation and foreign domination* was probably prompted as a result

⁶¹ Rwelamira op cit n28 at 558

of the African reality, which at the time included violent wars of independence or civil wars, and the consequent humanitarian concerns. In light of the fact that the 'specific revolutionary situations'⁶² for which these three terms in the OAU refugee definition refer to may no longer exist, with most African countries having already gained independence, these 'components of the expanded definition could thus be said to be irrelevant today.'⁶³ However, as Okoth-Obbo remarks, these grounds 'could also be viewed as vessels still possessed of the capacity for the legal transcription of Africa's refugee realities of today.'⁶⁴ In this regard, the recent 1998-2002 war in the Democratic Republic of Congo, in which several foreign armies such as Rwanda, Uganda, Zimbabwe and Angola were present in the country, may have easily fit into this definition. Similarly, the invasions by Ethiopian troops into Somalia, or Chadian soldiers in the Darfur region of Sudan may breathe new life into the use of these specific terms. Furthermore, and as will be discussed later in this paper, the fact that the OAU refugee definition was wholly incorporated into South Africa's national legislation means that these events may be applied to not only Africans, but other persons seeking asylum in South Africa based on the situations in their countries of origin. The current situation in Iraq, for example, may also qualify as *external aggression*, *occupation* or *foreign domination*.

Notwithstanding the foregoing, it is significant to acknowledge that the terms *external aggression*, *occupation* and *foreign domination* were not yet established in international law practice at the time of the adoption of the 1969 OAU Convention, and 'today there is still no consensus on the meaning of intervention in international law.'⁶⁵ For example, the basic concept of *aggression*, while discussed in international forums prior to 1969, was not formally defined until 1974. The United Nation's General Assembly set up a Special Committee to determine the definition of *aggression*, which in 1974 finally agreed on the following definition of the term: 'aggression is the use of armed force by a State against the sovereignty, territorial

⁶² Okoth-Obbo op cit n5 at 115

⁶³ Ibid at 116. As a result of this position, the author suggests that the 'expanded definition itself has now arrived at the need for review...[that] it should be upgraded to more properly reflect the actual situations which today cause people to flee as refugees in Africa. Here the Convention would have much to learn from the [1984] *Cartagena Declaration* which, in talking about generalized violence, internal aggression and massive violations of human rights, more fulsomely describes the refugee-producing circumstances in Africa today than does the [OAU] expanded definition.'

⁶⁴ Ibid

⁶⁵ Arboleda op cit n17 at 195

integrity or political independence of another State, or in any other manner inconsistency with the Charter of the United Nations as set out in this definition.⁶⁶

In terms of the meaning of *occupation*, humanitarian law provides an unambiguous definition of the term. For example, Article 2 of the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* states that the Geneva Convention applies to 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance.'⁶⁷ This definition is 'germane to refugee problems in Africa because it focuses on the *de facto* control of territory, whether occupation is "partial or total," [and] 'even if a state of war is not recognized.'⁶⁸

Of the three war-like events in the first category of enumerated OAU grounds, the meaning of *foreign domination* poses the most difficulty. The term seems to refer to the liberation struggles against colonialism, and while it has been used in various international documents and declarations, a clear definition of same has not yet been put forth. For example, the term is referred to in Article 20(3) of the *Banjul Charter* which states that: '...all peoples shall have the right to the assistance of the State parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.'⁶⁹ Rankin suggests that the broader concept of *foreign domination* may have been included due to the drafters' concerns that *aggression* and *occupation* did not fully convey the legal status of a colonial territory. This is due to the fact that, at the time colonial expansion was not considered an infringement on a conquered state's sovereignty. Technically speaking, 'occupation and aggression require the interaction of two sovereign powers' as opposed to colonial state situation, where the colonial government is

⁶⁶ General Assembly Resolution 3314 (XXIX) 29(1) RGA 142. 144 (1974). Rankin op cit n* at 14 n97 confirms that '...[while] there is some debate as to the universality of this definition, the International Court of Justice held in the *Nicaragua Case*, that it was the mirror of customary international law.' *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits) [1986] ICJ Rep 14 103.

⁶⁷ *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* 75 UNTS 287 (entered into force 21 October 1950) at Art 2, par 2

⁶⁸ Rankin op cit n12 at 15

⁶⁹ *African Charter on Human and Peoples' Rights* 27 June 1981 OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) (entered into force 21 October 1986)

vested with sovereignty. On the other hand, in a state of occupation or aggression, the occupied or aggressed territory retains its sovereignty.⁷⁰

b. *Events seriously disturbing public order*

According to Rankin, this second, broader category of OAU events 'arguably has a function comparable to "particular social group" in the 1951 refugee definition: that is, it acts as a basket clause capturing a generic set of refugee producing situations.'⁷¹ Many scholars, such as Hathaway, as noted above, consider that this category can include any man-made event. In fact, on the face of it and especially with regard to the African context, this category can possibly also include 'victims of ecological changes such as famine or drought, which remain among the most challenging situations on the continent.'⁷² In order to understand the extent of this category and to provide a legal basis for its meaning, this category of OAU events requires particular in-depth attention.

1. *The effect of 'seriously disturbing'*

Prior to examining the meaning of public order, it is relevant to look at the phrase *seriously disturbing*. These words, especially that of *seriously*, serve to inform of the level or extent of disturbance required for the OAU event to qualify as one that compels a person to take flight.

According to the ordinary meaning of the word, *disturb* means '1. a. *trans.* To agitate and destroy (quiet, peace, rest); to break up the quiet, tranquility, or rest of (a person, a country, etc.); to stir up, trouble, disquiet.'⁷³ The adverb *seriously* connotes the intensity or extent to which the event in question must disturb the public order. In this sense, one may take it to mean that the OAU event must earnestly, with gravity; not lightly or superficially disturb the public order. Accordingly, the 'OAU Convention's text suggests that there is an objective,

⁷⁰ Rankin op cit n12 at 15-16

⁷¹ Ibid at 16

⁷² Rwelamira op cit n28 at 558

⁷³ See Oxford English Dictionary online at <http://dictionary.oed.com>, accessed on 27 December 2007

quantitative element captured by the terms "seriously disturbing."⁷⁴ Rankin explains this point further as follows:

‘By placing “disturbance” alongside “public order,” the Convention’s text suggests that it is concerned by disturbance in the public context. And by including the term “seriously,” there is an indication that the gravity of the harm must be greater than emotional distress. Consequently, the test should be an objective assessment which considers the gravity of the harm in relation to what can normally be expected of public order.’⁷⁵

2. *The meaning of public order*

The term *public order* is a particular legal concept that is found in several international treaties, including the Universal Declaration of Human Rights⁷⁶, the International Covenant on Civil and Political Rights,⁷⁷ as well as the 1951 Convention. It is also mentioned in other parts of the OAU Convention, such as Article 3(1) relating to Subversive Activities⁷⁸ and Article 6(1) relating to Travel Documents.⁷⁹

Rankin suggests that the term *public order* was meant to be read in the technical sense and in the same way as it is intended to be read in the 1951 Convention for the following reasons:

‘First, the final draft of the OAU Convention substituted “internal subversion” with “public order” because the former was considered too ambiguous. This suggests an intention to use the term in its technical sense. And second, because the OAU Convention is the complement to the 1951 Convention, and because *public order* appears in both

⁷⁴ Rankin op cit n12 at 16

⁷⁵ Ibid

⁷⁶ *Universal Declaration of Human Rights* GA res 217A (III), UN DOC A/810 at 71 (1948) at art 29.

⁷⁷ *International Covenant on Civil and Political Rights* GA Res 2200A (XXI) 999 UNTS 171 (entered into force 23 March 1976) at art 12(3), 14(1), 19(3)(b), 21 and 22

⁷⁸ OAU Convention, Art 3(1) states that ‘[E]very refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order...’

⁷⁹ OAU Convention, Art 6(1) states that ‘[S]ubject to Article III, Member States shall issue to refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the Schedule and Annex thereto, for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require.’

instruments, it seems reasonable to give the terms the same meaning.⁸⁰

The 1951 Convention contains the term *public order* in its Article 32, which deals with the context of expulsion of refugees. More specifically, this Article states that '...contracting States shall not expel a refugee lawfully in their territories save on grounds of national security or public order.'⁸¹ While the words national security are rather clear, as acts performed in contravention of same would include those of 'a serious nature threatening directly or indirectly the government, the integrity or the independence of the state on whose territory a refugee stays',⁸² the term *public order* are not as apparent, as it is open to a wide range of interpretations.

In the discussions leading up to the 1951 Convention, due to the uncertainty over the precise meaning of the term *public order* amongst representatives of common and civil law states⁸³, in the 'spirit of compromise however, there was a general agreement that public order should be given a narrow interpretation, with travaux préparatoires serving as a definitive point of reference for state parties in interpreting their authority to expel refugees on public order grounds.'⁸⁴ Therefore, 'only the commission of a serious crime (not any crime) is grounds for public order expulsion and other concerns - such as basic affronts to public morality or social norms of the asylum country - are to be deemed grounds for expulsion only in truly grave cases.'⁸⁵

A Grahl-Madsen confirms the above position regarding the expulsion of refugees on the ground of public order by also referring to the 1951 Convention's travaux

⁸⁰ Rankin op cit n12 at 17

⁸¹ 1951 Convention, Art 32

⁸² A Grahl-Madsen *The Land Beyond: collected Essays on Refugee Law and Policy* (2001) at 8

⁸³ J Hathaway *The Rights of Refugees under International Law* (2005) at 684-686 in which the author states that the 1951 Convention's drafters decided not to amend the English language version of Art 32 to refer to 'public policy' which the Secretariat indicated was the true equivalent of the broad-ranging 'ordre public' in the French language text. The English notion of public order, while 'not a formal legal construct, authorizes expulsion only for the narrower range of concerns necessary to avoid public disorder.' Also, N Jayawickrama *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002) at 196 states that the 'nearest common law equivalent of [public order] is probably 'public policy' although this is now disputed.' Furthermore, at 196, he states that the French 'expression *ordre public* has several meanings in different contexts. It refers principally to the 'police power' of the state broadly conceived. This police power, however, must be exercised in a legal framework which includes fundamental human rights.'

⁸⁴ Hathaway op cit n83 at 685

⁸⁵ Ibid at 685-686

préparatoires, which state that the meaning of public order for the purposes of the expulsion of a refugee, was 'intended to be a reference to acts prejudicial to the 'peace and tranquillity of society at large.'⁸⁶ He summarizes his position by stating that 'the common criteria seems to be that public order is at stake only in cases where a refugee *constitutes a threat to an uncertain number of persons carrying out their lawful occupations (habitual criminal, wanton killers), or to society at large, as in the case of riots or unrest, or traffic of drugs.*'⁸⁷

Armed with a better understanding of the term *public order* in the context of expulsion of refugees on the ground thereof, it is still necessary to comprehend how the term may be applied in other contexts. For example, in the context of human rights law, the term may 'demonstrate a rare area of reciprocal interest between an individual and the state...[as] it looks to the basic standards governing the state in its relation to the community and its individual members.'⁸⁸

According to N Jayawickrama, the term *public order* ordinarily means the prevention of disorder or crime, however it is actually something more than ordinary maintenance of law and order.⁸⁹ In his seminal work *The Application of Human Rights Law: National, Regional and International Jurisprudence*, in determining whether an act affects public order or law and order, Jayawikrama explains that the term *public order*:

'...is synonymous with public peace, safety and tranquillity, an absence of public disorder. The test...is to ask whether it leads to the disturbance of the life of the community; or whether it affects merely an individual, leaving the tranquillity of society undisturbed. It is a question of degree and the extent of the reach of the act upon society. Thus, communal disturbances, the creation of internal strife or rebellion and strikes promoted with the sole aim of causing unrest in the labour force, are obvious instances of act impacting against public order. In short, public order implies an absence of violence and an orderly state of

⁸⁶ See Rankin op cit n12 at 17 n15

⁸⁷ A Grahl-Madsen *Commentary on the Refugee Convention 1951, Articles 2-11, 13-37* (1997) published by the Division of International Protection of the United Nations High Commissioner for Refugees accessed on 23 January 2008 at www.unhcr.org/publ/PUBL/3d4ab5fb9.pdf at art 32.

⁸⁸ Rankin op cit n12 at 17-18

⁸⁹ N Jayawickrama op cit n83 at 195 and 465

affairs in which people can pursue their normal avocation of life.⁹⁰

With regard to the position that *public order* relates to the standards governing the State in relation to its communities and citizens, Rankin raises the question of how to characterize the minimum standards of *public order*. She reviews a variety of thresholds to determine same, such as that of non-international armed conflict and, on a lower threshold, internal disturbances and tensions and concludes that they all fall within the definition of public order because 'they occur on a sufficiently wide scale and because they violate a core set of human rights which fundamentally undermines the peace and tranquillity of a society at large.'⁹¹

The above being said, the question remains whether a situation of widespread violations of human rights may also find itself within a reading of *events serious disturbing public order*. The author of this paper submits that, in light of the OAU Convention's underlying rationale and function, being to extend refugee protection to those persons not easily falling within the 1951 definition, violations of fundamental human rights on a sufficiently large scale indeed suggest that public order has been disturbed. In light of the first category of OAU events, Rankin concurs and argues that there is an 'underlying concern [in the OAU definition] about a substantial disruption to the community as a whole and to the basic principles that ought to govern relationships within a given community.' As such, she concludes that 'to seriously disturb public order should be seen as event-type involving violence *or* threats against an indeterminate number of people or to society at large [emphasis added].'⁹²

Serious or massive violations of human rights should therefore qualify as threats to people or to society at large. Fundamental human rights clearly include, amongst others, the right to life and the prohibition against torture or cruel, inhumane or degrading punishment. However, whether serious violations of persons' socio-economic rights can be included in this manner, as opposed to merely violations of civil and political rights, is another unresolved aspect of this part of the OAU definition.

⁹⁰ Ibid at 466

⁹¹ Rankin op cit n12 at 18

⁹² Ibid at 19

Finally, it is also unclear whether or not environmental disasters would constitute *events serious disturbing public order*. As stated above, on the plain reading of the text, there is no obvious reason why this cannot be the case. However, the author concurs with Andrew E. Shacknove, who explains that natural disasters should not necessarily be included in the definition:

'When determining who is, or who is not, entitled to refugee status, natural disasters, such as floods and droughts, are usually dismissed as the bases for justified claims. Unlike the violent acts one person perpetuates against another, such disasters are not considered "political" events. They are, supposedly, sources of vulnerability beyond social control which therefore impose no obligation on a government to secure a remedy. The bonds uniting citizens and state are said to endure even when the infrastructure or harvest of a region is obliterated. For even an ideally just state cannot save us from earthquakes, hurricanes, or eventual death. The legitimacy of the state rests exclusively on its control of human actions rather than on its control of natural forces, and the obligation of a government extends no further than the realm of human capabilities.'⁹³

Rankin also proposes that because the category of *events serious disturbing public order* is a 'basket clause,' it should be read *ejusdem generis* to mean events that are common to the man-made events of aggression, occupation and foreign domination.⁹⁴ In this regard, Rankin concludes that:

'Disruptions to public order are about breakdowns in human relationships and antagonisms within the community. The OAU Convention's communitarian perspective rests on a belief that the community can become a threat to itself or to the well-being of its members. A natural disaster represents a threat to the community, but rather than coming from within, a natural disaster is an event which sees the community confront collective adversity from the outside. Still, it should be made equally clear that this does not licence a government or non-state actor to use natural disasters in pursuit of its own agenda. The definition would seem to capture the

⁹³ Shacknove op cit n11 at 279

⁹⁴ Rankin op cit n12 at 20

effects of a famine caused by states actions since this is merely using nature as a tool to a political end.⁹⁵

(iv) *in either part or the whole of his country of origin or nationality*

As mentioned previously, and according to international refugee law jurisprudence⁹⁶ and soft law⁹⁷, the 1951 Convention definition of a refugee implies that a person must first seek protection, if possible, to another specific region or area of his or her own country where there is no risk of a well-founded fear of persecution prior to seeking international refugee protection. This is more commonly known as the Internal Flight Alternative (IFA). However, in terms of the OAU refugee definition, the words 'in either part or the whole of his country of origin or nationality' specifically clarify that the IFA is an irrelevant consideration when determining refugee status.⁹⁸ These words therefore significantly extend the refugee definition and are 'probably explained by the inherently chaotic and unstable nature of the OAU events.'⁹⁹

Despite the foregoing, the words *in either part of the whole of* also raise the issue regarding the necessary nexus between the OAU event and the person being compelled to take flight. In this regard, Rankin poses the question of whether an asylum seeker can be declared a refugee if their flight was prompted by an event that took place in any part of their country of origin? She answers this question in the negative by proposing that the aforementioned nexus is created as a result of the fact that the asylum seeker is compelled to leave his 'place of habitual residence.' As such, the asylum seeker would likely not be compelled to take flight if the OAU event takes place in a region too distant and thus does not pose any risk or danger to the individual.¹⁰⁰

⁹⁵ Ibid at 21

⁹⁶ Such as *Rasaratnam v Canada* FCJ No 1256 of 1990, a Canadian Court of Appeal decision holding that the Internal Flight Alternative (IFA) requires no possibility of persecution in area of potential relocation rather than not unreasonable to seek refuge there, and *New Zealand Refugee Appeal* No. 71684/99 of 29 October 1999, a decision of the New Zealand Refugee Appeals Authority adopting the IFA principles of the Michigan Guidelines.

⁹⁷ Such as UNHCR's Guidelines op cit n38 and the *The Michigan Guidelines on the Internal Protection Alternative*, April 1999

⁹⁸ UNHCR Guidelines Ibid at par 5

⁹⁹ Rankin op cit n12 at 25

¹⁰⁰ Ibid at 25

Lastly, another unique commentary on this aspect of the OAU definition relates to the inter-relationship of the phrase 'in part or whole of' to that of 'place of habitual residence' as well as 'compelled to leave.' In this regard, Rankin questions what would happen if a person, who may be visiting or temporarily working in a different part of the country, is caught up in an OAU event in that place and is unable to return home?¹⁰¹ Similarly, what would happen if, when that person is away, an OAU event in his or her place of habitual residence erupts, which prevents him or her from returning home? The result, in such situations, may be 'an effective internal flight alternative,'¹⁰² despite the fact that as mentioned above, the OAU refugee definition does not require an IFA. In any event, if a person in one of these situations ends up fleeing elsewhere outside of his or her country, such a quandary can be disentangled with an examination of all relevant factors, always bearing in mind the prospective or future looking definition of a refugee.

(v) *Compelled to leave*

As stated above, the OAU refugee definition is distinguished from the 1951 Convention refugee definition on the basis that, *inter alia*, it does not contain a subjective element; rather it is predicated on the objective events which prompt a refugee to take flight. While the word 'compelled' is admittedly an ambiguous one, it nevertheless seems to support the objective nature of the OAU definition. This is due in part to the plain meaning of the word, in part to the meaning of the word when taking consideration of the text associated with it¹⁰³, and also when taking into account the fact that the OAU definition is meant to be inclusive and should therefore be read flexibly.¹⁰⁴

According to the Oxford English Dictionary, the word *compelled* means 'constrained, forced or necessitated.'¹⁰⁵ In the refugee definition, the original French

¹⁰¹ Ibid at 26

¹⁰² Ibid at 26

¹⁰³ The maxim of legal interpretation that proposes that when a meaning of a term is unclear, it can be determined by looking at the words immediately surrounding it is called *noscitur a sociis*. See Rankin op cit n12 at 21.

¹⁰⁴ Rankin op cit n12 at 21-22

¹⁰⁵ See Oxford English Dictionary online at <http://dictionary.oed.com>, accessed on 27 December 2007

text of the OAU Convention uses the word 'obligée',¹⁰⁶ which also connotes that a person is forced or obliged to take flight due to one of the enumerated events, which according to Rankin represent the 'irresistible force'.¹⁰⁷ Furthermore, the word *compelled* when 'read in conjunction with the enumerated events or the reasons that cause the compulsion, indicates that such a fear or similar notion is assumed to exist...[and that] imply something more than a subjective choice.'¹⁰⁸

In analysing this particular phase in the OAU refugee definition, Rankin comments on another interesting and related interpretive issue. The plain meaning of the words *compelled to leave* could result in an exclusion of the possibility of a *sur place*¹⁰⁹ refugee claim, in which a person who is already outside of their country of origin or nationality 'when an OAU event takes place would not be compelled to leave, but would be compelled to remain.'¹¹⁰ Once again, however, if reading the OAU Convention in the spirit of good faith and in an approach consistent with the 1951 Convention definition, one can only conclude that the OAU definition should allow for *sur place* claims.

(vi) *Place of habitual residence*

As compared to the 1951 refugee definition, in order to satisfy the OAU definition, a person must have been compelled to flee from his or her place of habitual residence, rather than the entire country of origin. This phrase within the definition therefore implies a required geographic nexus between the OAU event and the person's place of habitual residence. It may also reflect the 'underlying spirit' of the OAU Convention, being a communitarian approach to refugee protection in which

¹⁰⁶ *Convention de l'OUA régissant les aspects propres aux problèmes des réfugiés en Afrique* 1001 UNTS 45 (No. 14691) at Art I(2). Art 10 of the OAU Convention confirms that this French text is 'equally authentic,' thus demanding compliance with Art 33(1) of the Vienna Convention, which provides that 'when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language...'

¹⁰⁷ Rankin op cit n12 at 21

¹⁰⁸ Ibid at 21

¹⁰⁹ According to the UNHCR *Handbook* op cit n40 at par 94-95 'a refugee *sur place* is a person who was not a refugee when he or she left his or her country, but became a refugee at a later date', often due to 'circumstances arising in his country during his absence.'

¹¹⁰ Rankin op cit n12 at 23

an asylum country may provide a 'surrogate community' for persons whose lives or safety are at risk in their own communities.¹¹¹

It is important to determine a definition of *place of habitual residence* in terms of the aforementioned nexus. In attempting to establish same, Rankin reviewed a number of sources, ranging from academic papers to international case-law and soft law. While no universal standard was found, Rankin established the following elements, which characterize the term *habitual residence*:

‘...[F]irst, habitual residence is a heavily fact based question. Second, in determining habitual residence, regard should be had both to a person's duration of stay and to whether their actions indicate a settled purpose. Third, a settled purpose involves considering a person's attachment to a particular location as evidenced by familial linkage, social and cultural relations, economic factors and other matters related to a person's ordinary mode of living. Finally, a person's intention to habitually reside in a particular place should be given some, but limited weight.’¹¹²

In light of the lack of requirement that, in terms of the OAU definition, a refugee must seek an internal flight alternative, there exists an additional interpretive difficulty in terms of *place of habitual residence*, which is based on the not so atypical course of flight of a displaced person. Often, as may be the case, a displaced person may leave his or her place of habitual residence due to an OAU event but not cross an international border. For example, he or she may be internally displaced from his or her place of habitual residence and thereafter take up residence in several secondary locations in his or her country of origin before finally fleeing across the border. In such a case, as Rankin astutely points out, a distinction needs to be made between a *place of habitual residence* and a "simple residence" as an asylum seeker may have many simple residences after the initial displacement. The test is, therefore, whether a new place of habitual residence becomes established. If so, it may be assumed that the original compulsion to flee due to the OAU event will have ceased and unless another OAU event takes place,

¹¹¹ Rankin op cit n12 at 23

¹¹² Ibid at 23

the person cannot be considered a refugee for the purposes of the OAU definition.¹¹³

(vii) *Conclusion*

The above section of the paper clearly demonstrates the numerous ambiguities and difficulties that exist in defining the OAU refugee definition. Searching for a legal basis to the various aspects of the definition is nevertheless an important undertaking as it assists in understanding how to properly apply the definition. Unfortunately, as will be seen below, there is a serious lack of international and national jurisprudence to assist decision-makers in South Africa with interpreting the various elements of the definition judiciously. Accordingly, a review of scholarly material analyzing South African refugee status determination practice and some unreported, rather not currently publicly available South Africa Refugee Appeal Board decisions, will be reviewed below to establish how the definition is being applied and interpreted in South Africa to date.

III. The South African position

(i) *Background: History of refugee protection in South Africa*

During the Apartheid era, South Africa was regarded as a refugee-generating rather than a refugee-receiving country. This was a time in which many of the country's black struggle heroes were forced into exile, and the Apartheid regime only granted a form of ad-hoc asylum to a small number of white persons who were fleeing from countries such as Rhodesia or Mozambique.¹¹⁴ Moreover, during Apartheid, the South African government was the root cause of the forced displacement of mass numbers of persons in neighbouring southern African countries, as a result of the actions of its military. The political stability in the country since its transition to democracy in 1994, however, has opened up South Africa to migrants from different parts of the world.

¹¹³ Rankin op cit n12 at 25

¹¹⁴ Legal Resources Foundation 'Country Report - Asylum and Refugee Policies in South Africa' in *A Reference Guide to Refugee Law and Issues in Southern Africa* (2002) 73 at 74

In 1993, as the Apartheid system began to break down, the government of South Africa signed a Basic Agreement with the United Nations High Commissioner for Refugees (hereinafter the 'UNHCR') to begin accepting refugees and provide protection to persons within its territory who were fleeing their countries on the grounds set out in both refugee Conventions. Subsequently, South Africa signed the international and regional Conventions regulating the protection of refugees; it acceded to the 1951 Refugee Convention and the 1967 Protocol on 12 January 1996 and to the 1969 OAU Convention on 15 December 1995. Shortly thereafter, South Africa embarked on an extensive consultative process,¹¹⁵ which led to the creation of its first domestic piece of legislation specifically dealing with the status determination and protection of refugees.

South Africa's Refugees Act 130 of 1998 (hereinafter the "Refugees Act") was promulgated by Parliament in the end of 1998, and it came into force in April 2000. The Refugees Act is considered to be very progressive and rights-based in its approach to refugee protection. This is in line with South Africa's constitutional democratization process at the time, in which the overall aim was to establish a human rights based society. The Refugees Act contains both the 1951 Refugee Convention and 1969 OAU Convention definitions of a refugee.¹¹⁶

To better comprehend the way in which the drafters of the Refugees Act intended the OAU refugee definition to be interpreted and applied in South Africa, it is relevant to examine the official documentation which preceded the passing of the Act. In this regard, the Draft Green and White Papers are the sources that may be relied upon. Unfortunately, they do not shed much light on the issue. The Draft Green Paper on International Migration¹¹⁷ contained various recommendations pertaining to a separate and self-standing piece of refugee legislation in South Africa, which should:

'...be based on a model of refugee protection that is rights-based, solution-oriented, with the sharing of the burden across all SADC member states. The objective of the

¹¹⁵ in which it procured a Draft Green Paper on International Migration and a Draft Refugee White Paper, see cites below.

¹¹⁶ Section 3(a) and (b) of the Refugees Act.

¹¹⁷ Draft Green Paper on International Migration Notice 849 of 1997, South Africa, May 1997

model is to provide temporary protection to persons whose *basic human rights are at risk* in their country of origin...'¹¹⁸

The Green Paper only refers briefly to the OAU refugee definition, indicating that it is applicable in the South African context, however, it does not expand on its intended meaning. On the other hand, South Africa's Draft Refugee White Paper¹¹⁹ provides some insight into the way in which the drafters of the country's refugee legislation intended that the extended refugee definition be taken to mean. The Draft White Paper stated that the 'OAU definition should be interpreted to include those who have come to South Africa because their lives, safety or freedom are threatened [by the OAU events].'¹²⁰ In making this statement, the drafters of the White Paper used terms very similar to the expanded refugee definition found in the 1984 Cartagena Declaration,¹²¹ which drew inspiration from the OAU Convention.¹²² Furthermore, in terms of the extent of the application of the definition, the White Paper goes on to warn against using the OAU definition 'to include victims of poverty and other social or economic hardships, environmental disaster, or other factors not directly or secondarily recognized in refugee obligations.'¹²³

(ii) *Section 3(b) of South Africa's Refugees Act*

Prior to examining whether or not South Africa judiciously applies the OAU Convention refugee definition, it is necessary to briefly note the subtle differences between the OAU Convention's refugee definition and the way the definition has been included in South Africa's national legislation. According to section 3(b) of the Refugees Act:

¹¹⁸ Ibid at par 4.2.1.

¹¹⁹ *Draft Refugee White Paper Notice 1122 of 1998*, South Africa, July 1998

¹²⁰ Ibid at par 2.3

¹²¹ *1984 Cartagena Declaration on Refugees* OAS Soc. OEA/Ser.L/II.66, Doc 10, Rev 1 at 190-193, entered into force 22 November 1984 [Cartagena Declaration]. The Cartagena Declaration, while not a legally binding treaty, created customary international law and legal rules for defining refugees in Latin America. It further expanded the refugee definition to 'include among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.'

¹²² Par III(3) of the Cartagena Declaration refers to the 'precedent of the OAU Convention.'

¹²³ Draft White paper op cit n119 at par 2.6

‘A person qualifies for refugee status for the purposes of this Act if that person...owing to external aggression, occupation, foreign domination or events seriously disturbing *or disrupting* public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge *elsewhere* [emphasis added].’¹²⁴

As compared to the OAU Convention definition, the South African version of the expanded definition includes the words *or disrupting*, with regard to the description of the magnitude of harm that this second basket-clause category of OAU events must amount to, in order to justify a person's flight. The researcher has not been able to find any materials that point to a reason for this added word, but one must assume a purpose as to why the drafters chose to include it, because otherwise why would they have done so. According to the Oxford English Dictionary, it appears as though the word *disrupt* has a slightly stronger connotation than the word *disturb*, with its definition being: '**1. intr.** To burst asunder. *rare.* **2. trans.** To break or burst asunder; to break in pieces, shatter; to separate forcibly.’¹²⁵ It is thus possible that the drafters, by including this word, intended to simply clarify the extent to which the public order must be disturbed or disrupted such that an individual would be compelled to take flight.

Another slight modification of the OAU definition in the South African Refugees Act is the use of the word *elsewhere* as opposed to *another place outside his country of origin or nationality*. Interestingly, the plain reading of the word *elsewhere* does not necessarily imply that this refugee definition contains an alienage requirement, such as in the 1951 definition, that is to say that an asylum seeker needs to be outside of his or her country of origin in order to qualify for refugee status.¹²⁶ It is assumed, however that this is indeed the case, as the drafters of the Refugees Act likely intended to replicate the position of the OAU Convention definition, which is influenced by the 1951 Convention definition and which clearly requires alienage as a pre-requisite to someone being considered a refugee.

¹²⁴ Section 3(b) of the Refugees Act 130 of 1998

¹²⁵ See Oxford English Dictionary online at <http://dictionary.oed.com>, accessed on 27 December 2007

¹²⁶ See *UNHCR Handbook* op cit n40 at par 88 for reference to this principle, also known as the *alienage* requirement in refugee law.

In terms of the scope of application of section 3(b) of the Refugees Act, as noted earlier, the question remains whether in South Africa this definition applies to every person or rather only to every African. This question may be answered by examining the actual manner in which refugee status determinations take place in the country, as well as asylum statistics of the Department of Home Affairs. The following section of the paper will examine this subject in further detail.

(iii) *South African refugee status determination process and the OAU definition: a form of prima facie refugee status determination?*

In South Africa, it is the responsibility of the Department of Home Affairs to determine the status of refugees. The Refugees Act created essentially a two-tiered process for refugee determination in which asylum applications are received by a Refugee Reception Officer, at one of five designated Refugee Reception Offices in the country, and then heard or determined by a Refugee Status Determination Officer. An unsuccessful asylum seeker may appeal his or her unfounded rejection to the Refugee Appeal Board, or his or her manifestly unfounded rejection to the Standing Committee for Refugee Affairs, both of which are quasi-judicial independent administrative tribunals established under the Refugees Act.¹²⁷

While the Refugees Act provides for special measures or powers of the Minister of Home Affairs to be taken in times of a mass-influx of refugees into the country¹²⁸, it was anticipated, and in fact legislated that in the normal course, each asylum seeker in South Africa receives an individual refugee status determination. As mentioned previously, prima facie refugee determination came about as a practical solution in situations where entire groups of persons become displaced due to reasons that indicate that each member of the group could be individually considered as a refugee. With this in mind, in the South African context, the

¹²⁷ According to the Chairperson of the Refugee Appeal Board (discussions held with Chairperson on 21 February 2008, notes on file with researcher), the establishment in the Refugees Act of both these statutory bodies was likely as a result of the fact that prior to 1998, there existed only the Standing Committee, which was responsible for making all ad-hoc refugee status determinations in South Africa, and government simply did not think to terminate this body. In addition to reviewing manifestly unfounded decisions, the Standing Committee has other distinct functions, such as regulating the work of the Refugee Reception Offices, as set out in section 11 of the Refugees Act.

¹²⁸ Section 35 of the Refugees Act entitled *Reception and accommodation of asylum seekers in event of mass influx* provides the Minister with the ability to grant refugee status to a group or category of persons, although what is meant by a group of persons is unclear.

individual process of refugee status determination comes into cross-roads with the OAU refugee definition and the process of prima facie refugee determination, which is normally only used in times of emergency. This is because 'it appears that South Africa applies a form of prima facie asylum determination that is not related to a mass-influx situation, but rather depends on whether it is "obvious" than an applicant is a refugee, based on the danger and instability with a part of the applicant's country of origin.'¹²⁹

I van Beek explains this point further by asserting that in South Africa 'there is not only a mixed understanding of the definition of "prima facie refugees"...but on what is perceived as a mass influx situation.'¹³⁰ Van Beek's research included interviews with Department of Home Affairs officials, who stated that South Africa was at the time experiencing a situation of mass-influx as determined by reference to the actual number of asylum seekers that were entering the country. Interestingly, several years later, in a more recent *Department of Home Affairs: Refugee Affairs Directorate's report*, this very same conclusion is echoed. Refugee Affairs, throughout its *2006 Annual Report on Asylum Statistics*, concludes that South Africa is still experiencing a mass-influx of asylum seekers into the country.¹³¹

In this regard, there is a clear inconsistency that exists in terms of the legislative intent of the Refugees Act as compared to the actual understanding and practice of Department of Home Affairs officials at the refugee reception offices. More specifically, the Department of Home Affairs on one hand is stating that there is a mass influx of asylum seekers into the country, thereby legitimizing its use of the OAU refugee definition in order to "fast track" refugee status determinations. However, on the other hand, the Minister has never implemented the special provisions, in terms of her powers under section 35 of the Refugees Act, to deal with a mass-influx of asylum seekers into the country, if such was really the case. The special provisions that the Minister may invoke include the accommodation of

¹²⁹ I van Beek 'Prima facie asylum determination in South Africa: A description of policy and practice' in *Perspectives on Refugee Protection in South Africa* (2001) 14 at 18

¹³⁰ Ibid

¹³¹ Department of Home Affairs Directorate of Refugee Affairs *2006 Annual Report on Asylum Statistics*, January 2007, obtained by researcher from the UNHCR branch office in Pretoria, at 4 states that 'during 2006, Refugee Affairs experiences multifaceted challenges in dealing with mass influx of asylum seekers' and at 6 states that 'the mass influxes of asylum seekers have overwhelmed the already fragile refugee services.'

any specific category or group of asylum seekers or refugees in camps or refugee reception centres. To add to the confusion, nowhere in the Refugees Act is the term mass-influx actually defined.

Therefore, while there is seemingly no situation of mass-influx in South Africa at this time, the Department of Home Affairs' approach to refugee status determination in fact relies on the application of the OAU refugee definition to assist in accelerating or "fast-tracking" applications based on a prima facie recognition of refugee status. This can likely be explained as a result of the endemic resource and capacity shortages at the Department of Home Affairs: Refugee Affairs¹³², which 'pose serious challenges for Refugee Affairs...and have overwhelmed the already fragile refugee services.'¹³³

A Tuepker further adds that, in the process of "fast-tracking" applications within South Africa's refugee status determination procedure, which includes the use of unofficial or non-legislated for practices such as pre-screening processes,¹³⁴ reliance on implicit "white lists" of refugee producing countries, and the focus on merely confirming the nationality of an asylum seeker, indicates that the 'institutional culture [among the Department of Home Affairs] overwhelmingly supports an automatic link between nationality and refugeehood which produces the shared knowledge that asylum is only really for a select group of nationals.'¹³⁵

In terms of refugee status determination officers' focusing on the nationality of an asylum seeker, de la Hunt describes the following practice in more detail as follows:

'While the Department of Home Affairs denies keeping a list of "refugee producing countries" or a "white list" there is clearly a mindset or institutional culture within the department that determines who is a refugee and who is not, based on the asylum seeker's country of origin. The focus of this country-oriented approach is that, particularly

¹³² J du Plessis 'Home Affairs puts in overtime' in *Pretoria News* on 28 April 2008 at p 3

¹³³ Directorate of Refugee Affairs *2006 Annual Report* op cit n131 at 4

¹³⁴ 2006 Annual Report on Asylum Statistics op cit n131 at 6 confirms that this practice takes place, in order to 'lessen administrative load of refugee offices, then redirect manifestly unfounded cases to relevant directorates and finally provide assistance to deserving asylum seekers.' still taking place.

¹³⁵ A Tuepker 'On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice' (2002) *Journal of Refugee Studies* Vol 15 No 4 409 at 418.

in relation to countries whose nationals are very likely to be granted asylum (Somalia, for example), the focus of the determination hearing is on getting the asylum seeker to "prove" his or her nationality on the basis of his or her knowledge of demographics, culture and language, geography and the political landscape.¹³⁶

The aforementioned practices relied upon by Home Affairs officials may be evidenced by the fact that the majority of recognized refugees in South Africa 'are from countries in Africa where civil, generalized conflict and the breakdown of public order are endemic.'¹³⁷ Lee Anne de la Hunt surmises that Department of Home Affairs' acceptance rates fluctuate depending on the government's assessment of the situation in the countries from which the asylum seekers hail.¹³⁸ She further reasons that the high acceptance rates from these countries are made on the basis of the OAU refugee definition, in that:

'...the letters advising refugees that their asylum claims have been successful merely state this fact....[while] most of the rejection letters start by declaring that the asylum seeker has failed to prove that he or she has a well-founded fear of persecution, but then go on to give a (usually standardized) assessment of the situation within the country of origin (for example, that the country of origin is a democracy that protects its citizens) with very little analysis, of the actual claim itself, or its merits.'¹³⁹

The year-on-year increase in the number of asylum seekers arriving in South Africa undoubtedly places a burden on the already strained refugee services in the country. To some extent therefore it is understandable that 'at least implicitly...Home Affairs officials prefer easy acceptances on the basis of the OAU definition; it also appears, however, that they do not deal satisfactorily with claims arising from the Convention's narrower definition based on a persecution standard.'¹⁴⁰

¹³⁶ de La Hunt op cit n60 at 36

¹³⁷ Ibid at 35

¹³⁸ Ibid

¹³⁹ Ibid at 36. This practice is confirmed by the researcher's personal experience as a refugee legal counselor, having through the course of her employment, read hundreds of RSDO's rejection letters, which predominantly state that the asylum seeker does not qualify for refugee status because while he or she showed fear of past persecution, it could not be found that he or she would be persecuted upon return to their country of origin.

¹⁴⁰ Ibid at 36

As a consequence of the Department of Home Affairs' approach that the OAU definition patently supports the notion of refugee-generating countries, there appears to be another disturbing practice amongst the Department's officials, related to the limiting of the number of applicants who can apply for asylum. Many asylum seekers are simply refused entrance to the Refugee Reception Offices. For the most part, this practice is recognizably arbitrary and based on the large numbers of asylum seekers that queue outside the offices each day¹⁴¹, but it may also be on account of an applicant's nationality. In this regard, the following specific examples come to mind. Two particular clients at the researcher's office, one of Nepalese nationality and the other hailing from Fiji, were time and again denied access to the Cape Town Refugee Reception Office, having been advised by Home Affairs officials that Nepal and Fiji are safe countries and that they therefore could not be asylum seekers.

With the above being said, it would seem as if at first instance, that is to say at the Refugee Status Determination Officer interview level, the OAU refugee definition or section 3(b) of the Refugees Act is in fact only applied to African asylum seekers. Tuepker confirmed this fact in an interview she conducted with a Department of Home Affairs: Head Office official.¹⁴² Furthermore, L de la Hunt concludes that 'both the [Department of Home Affairs asylum] statistics themselves, as well as conversations with Home Affairs officials, indicate that the benefits of the extended definition are only available to African refugees.'¹⁴³

L de la Hunt questions, given the nature of refugee flows to South Africa, why the country adopted an individualized refugee determination system, and suggests that 'with hindsight, the Refugees Act may have benefited from a provision for fast-tracking of cases based on OAU Convention circumstances, or a modified group determination process.'¹⁴⁴ Aside from the fact that the legislative framework for

¹⁴¹ du Plessis op cit n132 in which the Department of Home Affairs estimates that 'between 1000 to 2000 foreigners were trying to apply for [asylum seeker] permits every day.'

¹⁴² Tuepker op cit n135 at 413

¹⁴³ de la Hunt op cit n60 at 36

¹⁴⁴ Ibid at 38-39. Further, the author, at 37, provides a number of possible explanations for why South Africa did not adopt a group determination procedure: 'First, there is a dearth of suitable models for a group determination procedure other than by way of decree based on group or nationality. Additionally, South Africa tends to look to the north, and particular the Commonwealth, for legal and administrative models. A culture of individual rights, including due process rights, has emerged in South Africa in recent years, perhaps strengthening the idea that asylum determination

refugee status determination in South Africa does not provide for the type of prima-facie refugee status determination which has clearly emerged, another particular problem that may arise with the use of such a practice is that such refugee status determinations fail to recognize that some applicants from 'refugee-generating' countries may also have individualized refugee claims, or in other words a well-founded fear of persecution. Ignoring this fact, or not providing each asylum seeker with the opportunity to fully explain his or her individualized reasons for fleeing his or her country, may have a negative effect on that refugee later on if or when the Department decides to invoke cessation of the refugee's status, based on the fact that the presumed conditions which caused the refugee to flee cease to exist.¹⁴⁵

(iv) *The position of the Refugee Appeal Board*

According to the experience of the researcher and as per the literature reviewed, the first instance decisions in South Africa's asylum process, in other words the decisions of Refugee Status Determination Officers (hereinafter RSDOs), are generally of such poor quality such that a specific determination as to their application of the OAU definition cannot be properly gleaned from same. In this regard, the RSDOs' decisions granting an applicant refugee status do not provide reasons for same, for example whether or not the applicant even was approved in terms of section 3(b) of the Act. Rather, they simply state '...[T]he application for asylum in respect of yourself has been approved...and your formal recognition of refugee status is hereby attached.'¹⁴⁶

On the other hand, decisions rejecting an asylum seeker's application must set out reasons for same, however they usually only set out the applicant's claim in a short paragraph, and then proceed to reject the claim based on reasons to the effect that the applicant could not establish a well-founded fear of persecution. This

should always be made on an individual basis. Further, the Department of Home Affairs' focus of immigration control makes it unwilling to let go of a case-by-case determination process, which legitimated and expedites deportation of rejected claimants. Finally, there could be difficulties in applying the exclusion clause (although this has yet to become an issue) for persons undeserving of protection for having committed serious crimes outside South Africa, including war crimes.'

¹⁴⁵ Section 36 of the Refugees Act allows the Minister to withdraw refugee status from someone's who ceases to remain a refugee for the reasons set out in Section 5 of the Refugees Act.

¹⁴⁶ Pro-forma letter appended to each B1-1155 Form (Refugee Regulations, 2000), also referred to as the Section 24 Refugee Status document.

conclusion is often reached after a recitation in a single paragraph that the conditions in their country of origin have improved. Furthermore, one often finds these decisions full of errors of law, such as the RSDO stating that the applicant cannot prove 'beyond a reasonable doubt' that he or she will experience persecution,¹⁴⁷ or statements that indicate that the RSDO clearly did not take into consideration the applicant's claim. The lack of sufficient and continuous training of Department of Home Affairs RSDOs, as well as lack of adequate resources to conduct country of origin research, undoubtedly accounts for the poor quality of these decisions.

In light of the above situation, it is therefore necessary to examine the decisions of the Refugee Appeal Board, which are generally lengthier, more detailed decisions, and which are inclusive of a more thorough review of the appellant's refugee claim, up-to date country of origin information and international jurisprudence, used to accept or reject an appellant's claim. Interestingly as well, the Refugee Appeal Board has itself on numerous occasions acknowledged the poor quality of the RSDOs' decisions, such that rather than conducting an appeal in the true sense,¹⁴⁸ the Refugee Appeal Board deems its hearings to be *de novo* hearings in which the Board in effect conducts a fresh refugee status determination hearing with the appellant.¹⁴⁹

Unfortunately, to date, the Refugee Appeal Board has officially made public only two of its decisions,¹⁵⁰ which makes it very difficult to properly ascertain or determine its jurisprudence. This is despite the good intentions of the Board to make more of its decisions widely available. However, with currently only four

¹⁴⁷ According to the South African High Court decision in *Tantoush v Refugee Appeal Board and others* (Case no. 13182/06 (TPD), 14 August 2007, unreported) at par 97, the standard of proof for a refugee claim is one of 'a reasonable possibility of persecution,' which is clearly not a criminal or even civil standard, rather it is somewhat less than a balance of probabilities.

¹⁴⁸ For example, by focusing on the first instance decision and allowing the appellant to argue grounds of appeal regarding same.

¹⁴⁹ According to first-hand observations of the researcher between 2006 and 2008, the Appeal Board practice indicates this position. In this regard, the Board members usually advise the appellant that the hearing is a *de novo* one. Furthermore, the Board members rarely refer to the appellant's file in order to confirm or dispute any facts stated at the Appeal, and reference by the appellant or his or her legal representative to an error made by the RSDO at first instance is usually only acknowledged by the Board member but not dealt with in detail.

¹⁵⁰ Currently on the Department of Home Affairs website, accessed on 28 January 2008 at <http://www.dha.gov.za/raab.asp>. Incidentally, there exists no statutory obligation on the Board to report its decisions, in terms of the Refugees Act, its Regulations, or the Appeal Board Rules 2003.

members sitting on the Board, and a backlog of approximately 20,000 cases,¹⁵¹ not including the fully booked appeal hearings scheduled through to the beginning of 2009, this is unfortunately unlikely to be a priority for the Board at this time. The inability of the researcher to obtain the desired amount of Appeal Board decisions to review for this research, despite her numerous requests of the Chairperson of the Refugee Appeal Board for same, also confirms the extent of the Board's immense amount of work. As a result of the lack of publicly available decisions, and/or accompanying statistics of the Refugee Appeal Board, similar to the constraints in analyzing first instance refugee status determination decisions, it is very difficult to precisely establish the manner in which the Board applies the OAU or section 3(b) refugee definition.

Fortunately, despite the dearth of appeal decisions made available to her at this time, the researcher, through her many interactions with the Refugee Appeal Board in the course of her employment as a Refugee Legal Counsellor, has been able to pose questions of the Appeal Board members in an attempt to better understand its interpretation of the OAU definition. In terms of the scope of application of the Refugees Act section 3(b), in other words whether the OAU definition applies to every person or only to every African, the Chairperson of the Refugee Appeal Board responded to the researcher's question as follows:

'...[T]he Board would apply [Section 3(b) of the Refugees Act] to anyone from any part of the world and not only Africans. The reasons here fore is that when the OAU Convention was incorporated into the Refugees Act, it did not specify that it would only apply to the African continent but was left open so to speak.'¹⁵²

In terms of the whether the IFA or Internal Flight Alternative may be applied to a person who takes flight as a result of a section 3(b) event, the Chairperson of the Appeal Board, on behalf of the Board, advised¹⁵³ that the Board is not wholly in agreement with the position taken by UNHCR or Hathaway, being that the IFA does not apply as the definition clearly states that the event need only take place in

¹⁵¹ This number was provided to the researcher by the Chairperson of the Refugee Appeal Board, Mr. Tjerk Damstra, on 8 January 2008, (notes on file with the author).

¹⁵² Email response to researcher's question by Refugee Appeal Board Chairperson, Mr. Tjerk Damstra, 3 July 2007 (notes on file with the author).

¹⁵³ In a conversation with the researcher on 7 February 2008 (notes on file with the author).

either part of the whole [of an applicant's] country of origin or nationality. In this regard, the Board is of the opinion that, if possible, an asylum seeker needs to have exhausted all internal remedies in his or her country of origin, prior to seeking protection abroad. This is in line with the notion of *surrogate protection*, in which the international community is only required by law to provide asylum when a person's government is unable to do so itself. In this regard, for example, it would not be possible or reasonable for a forced migrant from an event seriously disturbing the public order in Goma, in the eastern part of the DRC, to be required to travel to the very far-away capital city of Kinshasa, whereas fleeing across the border into a neighbouring country is safer and more practical. However, if internal flight from a location in which an OAU event took place to one in which there is safety within the country is possible and not unduly difficult for the individual, then the Board feels that the IFA issue may be raised.

Lastly, with regard to the issue of whether or not a person may become a *sur place* refugee according to the OAU refugee definition, the Chairperson of the Refugee Appeal Board advised the researcher of the following:

'..the OAU Convention or section 3(b) of the Refugees Act, 1998, cannot apply to a *sur place* case because of the wording of the definition or section i.e. you must be compelled to leave your habitual place of residence...If you were not compelled to leave then it cannot apply. However, looking at the wording of section 2 of the Refugees Act, 1998, read with section 3 of the Act, it is clear that a person [fearing a section 3(b) or OAU event] must be granted asylum *sur place*.¹⁵⁴

(v) *Some Refugee Appeal Board decisions reviewed*

According to section 26(1) of the Refugees Act, 'any asylum seeker may lodge an appeal with the Appeal Board...if the Refugee Status Determination Officer has rejected the application in terms of section 2(3)(c),¹⁵⁵ in other words, if the RSDO has rejected the application as unfounded. This automatic right to an appeal effectively means another layer added to the refugee determination procedure, since, as per the researcher's experience, it is more often than not the case that

¹⁵⁴ Email response to researcher's question by Refugee Appeal Board Chairperson, Mr. Tjerk Damstra, 4 January 2008 (notes on file with the author)

¹⁵⁵ Section 26(1) of the Refugees Act

rejected asylum seekers heavily rely on the appeal process for a proper decision on their claim and/or merely to prolong their stay in the country. The immense number of appeal cases already heard by the Appeal Board for which decisions are still pending and those which are scheduled to take place in the future, which currently run well into 2009, is symptomatic of this situation.

In light of the above, and the previously mentioned fact that the first instance decisions of the RSDOs still tend to be of relatively poor quality, it is concluded that an examination of the Appeal Board's application of the OAU definition is necessary to better ascertain South Africa's treatment of the extended refugee definition. Furthermore, as there exists no jurisprudence from South African courts considering the definition of section 3(b) of the Refugees Act, one is required to rely on the interpretations of the Appeal Board at this time.

As stated above, the researcher was unfortunately only able to obtain a handful of appeal decisions from the Refugee Appeal Board for the purposes of this study. In fact, the Chairperson of the Appeal Board provided the researcher with approximately one hundred random appeal decisions, of which only eight decisions dealt with the section 3(b) refugee definition. Despite the small sample, the mere fact that only such a small percentage of appeal board decisions raise the section 3(b) definition may indicate that most of the claims that fall within the ambit of section 3(b) are in fact properly adjudicated at first instance. Irrespective, an evaluation of the decisions obtained provides a picture of the Appeal Board applying the definition sensibly, yet at the same time rather cautiously.

Of the Appeal Board decisions obtained by the researcher, five of them dealt with the general application of the section 3(b) definition. In this regard, rather than analyzing a particular element of the definition itself, these decisions reviewed the appellant's claim, then reviewed the conditions in the appellant's country of origin and finally, concluded, based on the situation in the appellant's country of origin, whether or not the asylum seeker qualified for refugee status in terms of this definition. In terms of these decisions, especially those in which the Appeal Board upheld the appeal and granted refugee status based on the application of section 3(b), the question remains as to why the Refugee Status Determination Officer at first instance did not apply the same country of origin research and reasoning to

reach the conclusion that the asylum seeker must receive refugee protection. Unfortunately, due to the fact that the Refugee Appeal Board deems its hearings to be *de novo* ones, it is not possible when reviewing the Board's decision to assess the reasoning of the Refugee Status Determination Officer in coming to his or her negative decision at first instance for the same applicant. The researcher, however, on a number of occasions, has been advised by Department of Home Affairs officials, of the lack of sufficient internet facilities, hence country of origin research capabilities, of its Refugee Status Determination Officers. This explanation may account for the incorrect application of the OAU definition at first instance as officials are unable to properly assess the situation in the applicant's country of origin.

In Refugee Appeal Board decision number 159/2004¹⁵⁶, the Appeal Board granted refugee status to a Somali national hailing from the country's war-ravaged capital city of Mogadishu, the appellant's place of habitual residence. The appellant's claim consisted of his fleeing Mogadishu due to generalized life-threatening factional clan fighting which was occurring throughout the city. In its decision, the Appeal Board referred to various 2003 country reports, which confirm the large number of civilian deaths in the city due to the continued fighting in the capital city. Interestingly, in this case, counsel for the appellant argued that her client should be granted refugee status based on an individualized or 1951 refugee claim and also argued that the appellant did not have an Internal Flight Alternative as he could not flee to 'the northern part of the Somalia because he is from a different clan and will not be accepted there.'¹⁵⁷ In this regard, the Appeal Board pointed out that counsel erred as:

'...its reasons for not returning the appellant to his country of origin falls within the ambit of section 3(b) of the Refugees Act, 1998, and not as prayed for by Counsel in terms of section 3(a) of the Act. Section 3(a) makes it clear that a person must have a well-founded fear of being persecuted for a specific reason mentioned in the section. This is not the case with section 3(b) where a

¹⁵⁶ Upon providing the researcher with these decisions, the Chairperson of the Appeal Board requested the researcher to protect the anonymity of the appellants, hence the use of the Appeal Board decision number to identify the decision reviewed.

¹⁵⁷ Refugee Appeal Board decision number 159/2004 at p 3

person is compelled to leave his or her place of habitual residence because of, for instance, events seriously disturbing or disrupting public order and where persecution as such is not necessarily present. In this case, the appellant was compelled to leave Somalia because of the faction and clan fighting, in other words events seriously disturbing and/or disrupting public order, in order to seek refuge elsewhere.’¹⁵⁸

In another Appeal Board decision of a Somali national that was reviewed by the researcher the Appeal Board granted refugee status to the appellant who hailed from the southern Somali city of Kismayo. Similar to the above decision, according to this appellant’s personal background it emerged that ‘nothing has ever happened to him personally and that his complaint is based on the ongoing clan-related fighting taking place in Kismayo and elsewhere in Somalia.’¹⁵⁹ After reviewing the appellant’s claim, the Appeal Board went on to review a prominent country report on the situation in Somalia, which confirmed that the entire southern part of the country remains unstable due to chronic lawlessness and insecurity, hence ‘...[i]t is clear that anyone coming from the southern Somalia, such as Kismayo, whether anything has happened to them or not, fall within the group of asylum seekers needing international protection.’¹⁶⁰

According to the sample of decisions reviewed, it is evident that the Refugee Appeal Board *also dismisses* appeals on the basis of an analysis of the current conditions of the appellant’s country of origin. In this regard, the Appeal Board uses documentary evidence or country reports to indicate that a change in country of origin conditions has taken place such that it is now, based on a forward looking definition of a refugee, considered safe for the asylum seeker to return to his country of origin.

It is trite law that the refugee definition is a forward looking one, meaning that when a decision maker assesses whether someone qualifies for refugee status, he or she must determine if the asylum seeker will face persecution upon return to their

¹⁵⁸ Ibid at p 7

¹⁵⁹ Refugee Appeal Board decision number 418/05 at 6

¹⁶⁰ Ibid at 7

country of origin. The *Michigan Guidelines on Well-Founded Fear*¹⁶¹ expand on this point, but specifically with regard to the element of *fear* in the 1951 refugee definition:

‘An understanding of “fear” as forward-looking expectation of risk is fully justified by one of the plain meanings of the [Refugee Convention’s] English text, and is confirmed by dominant interpretations of the equally authoritative French language text (“craignant avec raison”), which do not canvass subjective trepidation. This construction avoids the enormous practical risks inherent in attempting objectively to assess the feelings and emotions of an applicant. It is moreover consistent with the internal structure of the Convention, for example with the principle that refugee status ceases when the actual risk of being persecuted comes to an end, though not on the basis of an absence of trepidation (Art. 1(C)5-6), and with the fact that the core duty of non-refoulement applies where there is a genuine risk of being persecuted, with no account taken of whether a refugee stands in trepidation of that risk (Art. 33).’¹⁶²

A similar approach, that of a forward looking assessment of risk, to refugee determination based on the OAU or section 3(b) refugee definition, also must take place when the RSDO or the Refugee Appeal Board is deciding upon an asylum seeker’s claim. This position is also logically consistent with the *cessation clause* found in the Refugees Act, 1998 at section 5(1)(e), which provides that a person ceases to qualify for refugee status if ‘he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist.’¹⁶³ In light of this fact, the Appeal Board appropriately assesses the prospective risk of an appellant by evaluating the *current* conditions in his or her country of origin.

¹⁶¹ *The Michigan Guidelines on Well-Founded Fear*, Third Colloquium on Challenges in International Refugee Law Convened by The Program in Refugee and Asylum Law, University of Michigan Law School, March 26-28, 2004, accessed on 25 January 2008, at <http://www.refugeecaselaw.org/fear.pdf>

¹⁶² Ibid at par 4-5

¹⁶³ Section 5(1)(e), Refugees Act

With the above in mind, an example of the Board's forward looking assessment in terms of sections 3(b) and 5(1)(e) of the Refugees Act is found in Appeal Board decision number 4013/03, in which the Board dismissed the appellant's claim. In this case, which the Appeal Board heard in February 2004, the Rwandan national fled his country of origin when the genocide reached his village in 1994. The appellant arrived in South Africa in 1995 and, by letter dated 10 September 1997, the Standing Committee for Refugee Affairs declined to grant him refugee status.¹⁶⁴ Once again, it is unclear why this decision was taken by the Standing Committee at the time, and in this regard, the Appeal Board confirms that 'because the appeal hearing is a *de novo* procedure, the appellant does not have to prove that the Standing Committee was wrong...[rather] the Board assesses the evidence given by the appellant and makes its own decision on the objective facts concerned.'¹⁶⁵ In any event, in terms of its assessment of the appellant's claim, the Appeal Board had 'no hesitation in finding that section 3(b) of the Refugees Act, 1998, applied to the appellant when he initially lodged his application for refugee status.'¹⁶⁶ However, the Appeal Board's decision to dismiss the claim was based on whether or not 'the situation in Rwanda has changed to such an extent that it is safe for appellant to return there.'¹⁶⁷ In this regard, and based on the Appeal Board's review of 2004 and 2005 Rwanda situation reports, the Board determined that it would be safe for the appellant to return to his country.

The above decision brings an important issue to the fore, that being the implications of such an extensive delay in the decision-making process of the Department of Home Affairs and Refugee Appeal Board. In the above case, the appellant arrived in South Africa in early 1995 and ten years later, his appeal to the Refugee Appeal Board was dismissed, based on a forward looking assessment of risk, essentially meaning that while the appellant *had* a genuine refugee-related reason for fleeing his country ten years ago, at present, however, according to the Appeal Board, he could safely return there due to the changed circumstances in his country of origin. Unfortunately, this approach fails to take into consideration the impact of section

¹⁶⁴ Prior to the Refugees Act being implemented, the Standing Committee for Refugee Affairs was the body that was responsible for individual refugee status determinations.

¹⁶⁵ Refugee Appeal Board decision number 4013/03 at 6 par 20

¹⁶⁶ Ibid at par 18

¹⁶⁷ Ibid at par 20

5(2) of the Refugees Act. This section states that cessation of refugee status based on section 5(1)(e) 'does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.' In the case of *Mayongo v Refugee Appeal Board & Others*¹⁶⁸ the South African High Court in a judicial review application of an Appeal Board decision dismissing an appeal of an Angolan asylum seeker, dealt with this issue specifically and granted the applicant refugee status. The Court held that

'According to the UNCHR handbook a person is a refugee as soon as he/she fulfils the criteria contained in the definition. That takes place before he/she applies for refugee status. Recognition of refugee status does not make the person a refugee but only declares that he/se is one....The RAB accepted that he was compelled to flee Angola. It follows that he was a refugee at the time. When the RAB dealt with the appeal it did not consider the impact of sections 5(1)(e) and 5(2) because the applicant never officially obtained refugee status. In that respect it made a basic error of law. It was in law compelled to determine whether the post-traumatic stress syndrome and major depressive disorder constituted a compelling reason to refuse to avail himself of the protection of the Angolan Government.'¹⁶⁹

With this *Mayongo* decision in mind, the Appeal Board's decision in the Rwandan national's case described above may also contain a similar basic error in law. The Board decided that the genocide in Rwanda fell within the meaning of a section 3(b) event, in other words, an event that compelled the appellant to flee his or her country because it seriously disrupted or disturbed the public order. In its decision, when reviewing the appellant's claim, the Appeal Board simply stated that the appellant was a Tutsi, who was forced to flee when the genocide reached his village. The researcher suggests that when the appellant arrived in South Africa, in terms of both the OAU *and* the 1951 Convention definitions, he would have qualified for refugee status. Not only does the genocide qualify as an OAU event, but because the appellant was a Tutsi, he was specifically persecuted due to his race or tribe, as contemplated in the 1951 Convention definition. The ten year delay in

¹⁶⁸ *Mayongo v Refugee Appeal Board & Others* [2007] JOL 19645 (T)

¹⁶⁹ *Ibid* at par 8, 9

finalizing this asylum seeker's claim, led to the Appeal Board dismissing his claim based on a lack of a forward looking assessment of risk, without taking into consideration possible circumstances of section 5(2) of the Refugee Act. The Appeal Board having framed the reasons why the appellant fled his country to be a section 3(b) reason only, may have led to this possible error.

Two further decisions of the Appeal Board examined by the researcher further highlight the significance of the forward looking assessment of risk as discussed above. These Appeal decisions were both in regard to Burundian nationals. The first of which, which was decided on 6 May 2004, found that the appellant, who fled his country in 1998, was a refugee because 'in the circumstances...the change(s) in Burundi have not been shown to be durable.'¹⁷⁰ This decision was reached after the Board reviewed country of origin information which showed that despite a ceasefire in Burundi, fighting was still taking place in the country, hence a durable change of circumstances could not be established. In this regard, the Appeal Board took into consideration Hathaway's following position on this point: 'This condition (durability) is in keeping with the forward-looking nature of the refugee definition and avoids the disruption of protection in circumstances where safety may be only a momentary aberration.'¹⁷¹

Nearly three years later, however, in an Appeal Board decision dated 4 April 2007, the case of a Burundian appellant, who fled his country in 1997 when the civil war was rife in his country, was dismissed due to country of origin reports that indicated that 'the conditions in Burundi are changing for the better.'¹⁷² In this case, the Board found that 'there have been no serious recurrences of the widespread armed conflict or serious human rights abuses that were widely reported in 2004 and that section 3(b) of the Refugees Act 130 of 1998 is no longer applicable,'¹⁷³ hence it was safe for appellant to return to his country at this time.

The remaining Appeal Board decisions that the researcher reviewed relate to specific aspects of the section 3(b) refugee definition. In this regard, the researcher

¹⁷⁰ Refugee Appeal Board decision number 294/04 at p 5

¹⁷¹ Ibid, quoting Hathaway *The Law of Refugee Status* op cit n9 at 203

¹⁷² Refugee Appeal Board decision number 002/06, at par 23

¹⁷³ Ibid at par 24

examined two Appeal Board decisions in which the phrase *place of habitual residence* was considered. In Appeal Board decision number 378/05, the appeal was upheld and refugee status granted to a female national of the Democratic Republic of Congo (DRC). The appellant was living and working in Uvira, and in September 2002 fled the generalized violence in that area, moving to Moba, another town in the DRC, where she remained for the next nine months. When the fighting reached Moba, she fled the country, eventually arriving in South Africa. She claimed she could not return to her country of origin, due to the ongoing fighting in the eastern part of the DRC. In this case, the Board stated that the principle issue to be decided is whether the appellant was compelled to leave her place of habitual residence in order to seek refuge elsewhere, in other words whether section 3(b) of the Refugees Act was applicable. In answering this question, the Board decided the following:

'The last location where the appellant "resided" in the DRC was Moba where she had fled to after leaving Mulonge village in Uvira. The Board has reservations whether Moba can be seen as the appellant's [place of] habitual residence and finds that it was not whether or not she was compelled to leave it. The Board finds that Uvira was the appellant's place of habitual residence which she was compelled to leave in order to seek refuge elsewhere. The appellant's evidence indicates that she was compelled to leave her place of habitual residence due to events seriously disturbing or disturbing public order i.e. the fighting taking place in the eastern DRC and specifically Uvira.'¹⁷⁴

The Board's above-interpretation relating to the appellant's place of habitual residence is, in essence, consistent with Rankin's comments relating to incidents of delay between the time when a refugee is compelled to leave his or her place of habitual residence due to an OAU event and the time he or she arrives in the country of asylum. During this period, an individual may be internally displaced and thus have to take up residence in various secondary locations before finally fleeing the country. Whereas within the context of the 1951 refugee definition, a delay in taking flight may affect the asylum seeker's credibility¹⁷⁵, in terms of the

¹⁷⁴ Refugee Appeal Board decision number 378/05 at par 21-22

¹⁷⁵ Due to a delay in the asylum seeker fleeing his country, it may be determined that the harm that the asylum seeker was facing was not serious, in other words it did not amount to persecution, such

OAU definition, a delay goes to the issue of whether someone has actually been compelled from their habitual residence.¹⁷⁶ Rankin elaborates on this issue further as follows:

'The short answer to the delay problem may be found in the concept of a continuing compulsion. That is the idea that having once fled from her place of habitual residence an asylum seeker will continue to be compelled so long as the displacement can be casually linked to an initial triggering event.'¹⁷⁷

In this same Appeal Board decision, the Board also confirms its cautious position taken with regard to the IFA, as described in the preceding section of this paper. More specifically, in this regard the Board states:

'The final question which the Board has to consider is whether in cases where section 3(b) of the Act is application, the internal relocation alternative can be applied or not. In this instance Counsel for the appellant has argued that it cannot be applied. The Board has certain reservations but for the purpose of this decision will go along with [Counsel's] argument. In the circumstances the appellant's appeal must succeed.'¹⁷⁸

In Refugee Appeal Board decision number 415/05, the Board again considered the issue of *place of habitual residence* when it dismissed the appellant's claim. In this case, the appellant, a national from the DRC, was living in Lubumbashi, but was on a fishing trip with friends during school holidays in Moba. When appellant and his friends received news that rebels were coming, they attempted to return home to Lubumbashi but they encountered government troops in the town of Pweto. The soldiers accused the appellant and his friends of being rebels and then forced the appellant to fight with them against the rebels. Shortly thereafter, the appellant was able to escape in an attack by the rebels on the army soldiers, and fled the country eventually arriving in South Africa. The appellant stated that when he fled, he was afraid to return to Lubumbashi because he would be accused of being a rebel and that furthermore he could not return to the DRC because of the war situation in the

that it required him or her to immediately flee the country. See Rankin op cit n12 at 25 n166 on this point.

¹⁷⁶ Rankin op cit n12 at 24-25

¹⁷⁷ Ibid at 25

¹⁷⁸ Refugee Appeal Board decision number 38/05 at par 23

eastern Congo. The Board found that the Appellant 'did not habitually reside at Moba or at Pweto in the lower eastern part of the DRC'¹⁷⁹ because he and his friends were there on vacation. The Board therefore concluded that 'it is clear that section 3(b) of the Refugees Act, 1998, has no application here as the appellant, and his friends, were not compelled to leave their place of habitual residence to seek refuge elsewhere.'¹⁸⁰ The Board furthermore decided that the appellant's assertion that he would be considered a rebel was implausible, and that Lubumbashi is under government control and according to country information is safe from fighting. Accordingly, the appellant was denied refugee status. This decision demonstrates an appropriate analysis on the part of the Appeal Board regarding the application of the OAU refugee definition. It furthermore reveals a situation in which the Appeal Board properly assesses an appellant's claim from the viewpoint of both the 1951 *and* the OAU refugee definitions.

Lastly, the final Appeal Board decision obtained by the researcher for the purposes of this paper focuses on the Board's specific interpretation of the meaning of a disruption or disturbance of the public order. In Refugee Appeal Board decision number 1433/06, the Appeal Board dismissed the appeal of a Nigerian asylum seeker based on its interpretation of this aspect of the 3(b) definition. In this case, the appellant claimed that, as a Christian, he was fearful of the fighting taking place in his country between Christians and Muslims, although 'he was unable to state exactly where the fighting was taking place.'¹⁸¹ In its decision, the Board reviewed country of origin information on Nigeria, which confirmed that 'there were incidents of violence between Muslims and Christians between 2001 and 2004 mainly in the Plateau and Kano states...[and] in reaction to the religious violence, President Obasanjo declared a state of emergency.'¹⁸² Furthermore, another report confirmed that as a result of violent incidents between Christians and Muslims during February 2006 in the city of Onitsha, from where the appellant hailed, the 'state governor deployed 2000 policemen on the streets and appealed for calm.' According to these reports, the Board concluded that 'the government [of Nigeria] is taking an active role in preventing and/or stopping the violent incidents between

¹⁷⁹ Refugee Appeal Board decision number 415/04 at par 22

¹⁸⁰ Ibid

¹⁸¹ Refugee Appeal Board decision number 1433/06 at par 8

¹⁸² Ibid at par 18

Christians and Muslims'¹⁸³ and that the 'government is doing all it can to prevent or control violent incidents between the two religious groups.' In turning to the application of section 3(b) of the Refugees Act, the Board concluded that the definition does not apply in this case, as events disrupting or disturbing the public order implies 'that the government is no longer in control,'¹⁸⁴ which according to the Board, 'is not the case in Nigeria at all, [since] the government is firmly in control.'¹⁸⁵

This interpretation of the Appeal Board of *events seriously disturbing or disrupting public order* is seemingly a narrow one. A government's attempts, no matter how genuine, to suppress or subdue serious disruptions or disturbances of public order should not be the litmus test for the application of this definition, since generalized violence and massive human rights violations may nonetheless take place, thereby compelling someone to take flight. The effectiveness of a government's attempts must therefore be considered as well. While the above case involved a clearly weak refugee claim, in that the appellant could not even point to specific events that compelled him to take flight, the Board in this decision nevertheless demonstrated a restrictive analysis, as nowhere did it question the ability of the Nigerian government to control the unrest that had occurred. The following decision of the Appeal Board reviewed by the researcher is, however, more instructive on this point.

In the course of her employment, the researcher has come across only one other Appeal Board decision, which provides further insight into the Board's interpretation of section 3(b) of the Refugees Act, and which complements the above decision. In Refugee Appeal Board decision number 729/06, in which the Board dismissed the appeal of a Burundian asylum seeker, the Board stated the following:

'Where law and order has broken and the government is unwilling or unable to protect its citizens, it can be said that there are events seriously disturbing or disrupting public order. To determine when a disturbance had taken place involves weighing the degree and intensity of the conduct

¹⁸³ Ibid at par 19

¹⁸⁴ Ibid at par 22

¹⁸⁵ Ibid

complained of against the degree and nature of the peace which can be expected to prevail in a given place at a given time. The test should be objective.¹⁸⁶

This quote provides some clarity as to the Board's interpretation of *events seriously disrupting public order* as here the Appeal Board refers to the necessary ability of a government to protect its citizens in the face of an OAU or section 3(b) event. Accordingly, it can be stated that the Board takes the position that only when an asylum seeker's government is *unwilling or unable to protect* its citizens in the face of law and order having broken down, does this constitute a section 3(b) event. What is unclear or undefined, however, is the precise meaning of 'law and order breaking down.'

V: The Case of Displaced Zimbabweans – Applying the OAU definition in order to provide the necessary protection?

The recent mass exodus of migrants from Zimbabwe has been the recent focus of much media and public interest in South Africa. According to various reports, there are as many as three million Zimbabweans in South Africa seeking work and asylum.¹⁸⁷ Furthermore, from the researcher's experience, the number of Zimbabweans seeking asylum in South Africa has increased dramatically over the past three years. The most significant observation with regard to this issue, however, is the fact that the Department of Home Affairs is denying that the Zimbabweans streaming into South Africa can be classified as refugees because they are not facing persecution in their home country, and that the UN High Commissioner for Refugees concurs, saying that there is no crisis.¹⁸⁸ In this regard, the researcher has personally interviewed a number of Zimbabwean nationals who

¹⁸⁶ Refugee Appeal Board decision number 729/06 at par 13

¹⁸⁷ See 'Zimbabwe "ignoring" SA diplomacy' (14 May 2007) accessed on 25 January 2008 at <http://news.bbc.co.uk/2/hi/africa/6653789.stm> or Human Rights Watch 'South Africa: Zimbabwean Migrants Vulnerable to Abuse: Government Officials and Commercial Farmers Violate Migrants' Basic Rights' (8 August 2006) accessed on 28 January 2008 at <http://www.hrw.org/english/docs/2006/08/08/safrica13923.htm>

¹⁸⁸ T Karimkwenda 'SA Home Affairs in Denial over Zimbabwean Refugees' (2 August 2007) accessed on 12 January 2007 at <http://www.swradioafrica.com/news020807/Homeaffairs020807.htm> Furthermore, the report of A Powell 'SA to Bear the Brunt of Illegal Migration' in Cape Times (27 December 2007) at 4 accessed on 8 February 2008 at http://www.iol.co.za/index.php?click_id=13&set_id=1&art_id=vn20071227063103238C615190 a stated that 'of the 3 074 Zimbabweans who applied for asylum in the first three months of [2007], only 79 were granted [refugee status], likely because the Department regards Zimbabweans as economic migrants who are not deemed eligible for asylum.'

have either obtained refugee status in South Africa or are seeking it due to *prima facie* claims of persecution due to their political opinion, wither genuine or imputed to them. It therefore cannot be stated that *all* Zimbabweans are not facing persecution in their country, especially in light of the concurrent reports confirming that opposition party members and activists are being attacked, beaten or tortured in Zimbabwe.¹⁸⁹

The fact is that there *are* many Zimbabweans who do qualify for refugee status based on the 1951 Convention definition; however, indeed the majority of Zimbabweans in South Africa may not necessarily qualify for refugee status based on the individualized refugee definition, as they are simply fleeing their country due to the grave, indiscriminate situation occurring there at this time. There is no denying that Zimbabwe is a country in the middle of an economic crisis that has resulted in chronic shortages of food, fuel and foreign currency as well as record inflation and unemployment. That this is a humanitarian crisis is not a question. Whether it is a situation that can be characterized as *events seriously disturbing public order* for the purposes of the section 3(b) refugee definition is another matter. Noticeably, in the South African government and UNHCR statement referred to above, there is no mention whatsoever of the possibility that these Zimbabweans may qualify for refugee status in terms of the OAU refugee definition.

As stated, the mass departure from Zimbabwe has taken place during a time which has seen in that country an increase in political repression, resulting in severe violations of civil and political rights, such as arbitrary arrests, detentions and brutality against opposition political members. Still, economic and social rights have also been violated in Zimbabwe to a mass degree, including large-scale forced evictions¹⁹⁰, the politicization of food aid¹⁹¹ and an economy that has practically

¹⁸⁹ See 'Zimbabwe: Opposition Activists Teargassed, Beaten' (23 January 2008) accessed on 28 January 2008 at <http://allafrica.com/stories/200801230905.html>, and 'Opposition leader: Zimbabwean aide beaten' (18 March 2007) accessed on 28 January 2008 at <http://www.cnn.com/2007/WORLD/africa/03/18/zimbabwe.arrests/index.html>, and 'Zimbabwe opposition leader "beaten unconscious by police"' (13 March 2007) accessed on 28 January 2008 at <http://www.independent.co.uk/news/world/africa/zimbabwe-opposition-leader-beaten-unconscious-by-police-439954.html>

¹⁹⁰ For example, the Zimbabwe government's 2005 Operation Murambatsvina ("drive out trash") in which nearly 200,000 urban poor in Harare were made homeless. See UNICEF Report 'Helping

collapsed as a result of the government's economic policies.¹⁹² In this regard, the question that the researcher is asking in this part of the paper is whether an economic meltdown at the hands of government can qualify as an OAU or section 3(b) event, when the end result is massive violations of the local population's economic and social rights.

The aforementioned Department of Home Affairs press statement and the consistent denial of refugee status by Refugee Status Determination Officers at first instance to those Zimbabwean asylum seekers who clearly do not have individualized claims of persecution¹⁹³ may be indicative of the government's position on this point. Furthermore, the South African government's reported high levels of mass deportation of Zimbabweans¹⁹⁴ supports the position that, according to South African officials, Zimbabweans are merely economic migrants, who do not deserve refugee protection. This position is particularly worrisome as the South African government is failing to assess whether the 'economic reasons' of these migrants for leaving their country are possibly the result of a loss of public order in Zimbabwe or whether these reasons may amount to economic and social rights violations that constitute persecution or result in a risk to their life.

The only way in which the OAU Convention's expanded refugee definition could apply to these Zimbabwean migrants is if the current situation in that country can be qualified as equalling that of events seriously disturbing or disrupting the public order. Due to the political implications of such a decision, in other words, the prospect of the floodgates literally opening up, it is highly unlikely that the government of South Africa will ever consider the situation in Zimbabwe to qualify

homeless victims of forced evictions in Zimbabwe' (20 June 2005) accessed on 28 January 2008 at http://www.unicef.org/infobycountry/zimbabwe_27463.html

¹⁹¹ See Human Rights Watch report 'Zimbabwe: Food Used as Political Weapon' (24 October 2003) accessed on 28 January 2008 at <http://hrw.org/english/docs/2003/10/24/zimbab6477.htm>

¹⁹² Zimbabwe's inflation rate has been estimated at over 8,000%, the world's highest. See BBC News Article Zimbabwe inflation "incalculable" (27 November 2007) accessed on 28 January 2008 at <http://news.bbc.co.uk/2/hi/africa/7115651.stm>

¹⁹³ This assertion is made resulting from observations of the researcher. The Department of Home Affairs is seemingly treating most Zimbabweans in South Africa as economic migrants. As such, many refugee claims of Zimbabwean nationals are being rejected as manifestly unfounded.

¹⁹⁴ According to A Powell 'SA to Bear the Brunt of Illegal Migration' in Cape Times 27 December 2007 at 4 accessed on 8 February 2008 at

http://www.iol.co.za/index.php?click_id=13&set_id=1&art_id=vn20071227063103238C615190 'official statistics showed that of the 245 294 people deported in 2006, 127 097 were from Zimbabwe. More than 117 000 Zimbabweans were deported between January and July this year alone. The current monthly average of deportation is 16 000 with a peak of 21 400 in January.'

as such. This is despite the fact that, as seen above, the exact meaning of the term public order is unclear. In this regard, this paper has shown that the term may refer to an undermining of the peace or tranquillity of society, as a result of sufficiently wide-scale violations of human rights, which are not specifically settled as only being civil and political rights. Furthermore, in line with the above-noted position that the category of *events seriously disturbing public order* may include all man-made events, the government-caused widespread economic deprivation affecting a significant percentage of the Zimbabwean population can indeed be considered as such an event. Clearly, such an event or situation is not akin to a natural disaster such as a flood or drought, which produces 'sources of vulnerability beyond social control [and] therefore imposes no obligation on a government to secure a remedy'.¹⁹⁵

When initially approaching the Refugee Appeal Board for section 3(b) decisions to use for this research, the researcher specifically requested the Board for cases involving Zimbabwean nationals. In this regard, the researcher wanted to understand the Board's position on this sensitive issue. Unfortunately, no Appeal Board decisions involving Zimbabwean nationals were made available for this purpose. Nevertheless, according to the decisions reviewed above, it appears as though the Refugee Appeal Board would also not construe the grave economic situation in Zimbabwe as *events disrupting or disturbing the public order*, as according to the Board this terms implies that the government is no longer in control. The Appeal Board would likely argue that the Zimbabwe government is in control, albeit doing dreadfully in terms of its economic policies. In this regard, the Board similarly confirmed¹⁹⁶ that Operation Murambatsvina could not be considered an event seriously disturbing public order because it was an act undertaken by a government that was purportedly in control; hence it had the authority to undertake same.

Furthermore, the Appeal Board, in decision number 729/06, stated that when law and order has broken down in a country and the government is unable to unwilling to protect its citizens in the face of same, then such circumstances constitute a

¹⁹⁵ Shacknove op cit n11 at 279

¹⁹⁶ In a discussion with the Chairperson of the Refugee Appeal Board on or about 30 July 2007 (notes on file with the author)

section 3(b) event. Unfortunately, as stated above, the Appeal Board did not describe or give meaning to the term *law and order*. In any event, if the Board decides that the actions of the Zimbabwean government are taken within its authority to do so, then the Board may assert that nothing indicates that the Zimbabwean government is unwilling to protect its citizens. It can be argued, however, that if the actions of the Zimbabwean government have created an arguably life threatening situation, then the state has failed in its basic duty to protect its citizens and the state is unable to protect its citizens, hence a claim for refugee protection is in order. Alternatively, if the Zimbabwean government's actions are deliberately aimed at depriving a specific social group disproportionately, then an argument can be made for refugee protection in terms of the 1951 Convention definition.

In the opinion of the researcher, due to the government-induced collapse of the Zimbabwean economy and the consequent wide scale social and economic rights violations in Zimbabwe, there is a case to be made for the inclusion of the displaced Zimbabweans as refugees in terms of the OAU refugee definition. In this regard, the economic collapse may be viewed as the *event disturbing or disrupting the public order*, with its effects being mass violations of human rights. Regrettably, the researcher could not locate precedents from elsewhere in Africa to support this type of inclusion. In any event, this is no more than an academic argument, as the political implications of taking such a position are not fathomable for the South African government at this time. With this in mind, and in light of the continuing humanitarian crisis in Zimbabwe, there is still the need for a temporary solution to the challenges presented by the large number of Zimbabwean migrants in South Africa. F Khan, the Coordinator of the Refugee Rights Project at the University of Cape Town Law Clinic, examined this issue and concluded as follows:

'South Africa's very recent inclination to provide a special temporary residence permit to Zimbabweans (one that will legalize their stay for a short period of time and allow them to work in the interim) will hopefully fill the gap in South Africa's law....[S]uch a permit would not only promote the legal entry of Zimbabweans into South Africa at a port of entry, but at the same time it will serve a much greater purpose - formulating a policy for socio-economic migrants

who are facing a humanitarian crisis which will ensure that refugee protection is not being eroded.¹⁹⁷

VI. Conclusions

In light of the continuing trend that has seen the narrowing of the scope of application of the 1951 Convention definition, resulting in the denial of protection to people who require safety for their lives outside of their country of origin or nationality, the expanded OAU refugee definition represents an 'opposite trend [and] is what comprises its true value for refugee jurisprudence at a global level.'¹⁹⁸ Whether or not in the South African context this is the case has been the focus of this research paper. The above case study of the mass numbers of Zimbabwean forced migrants in South Africa is evidence of a missed opportunity that South Africa has to extend refugee protection to a clearly vulnerable group of persons. It is assumed, however, that the South African government is unwilling at this time to go as far as to take such a decision, given the far-reaching implications it may have.

Acknowledging the contention that qualifying Zimbabwe's government-induced collapse of the economy as an OAU event may be an overly inclusive extension of the OAU refugee definition, the question remains whether South Africa is applying the expanded refugee definition sensibly and judiciously, and as such providing international protection to those forced migrants who may otherwise not qualify for refugee status in terms of the 1951 Convention definition. This research indicates that the answer to this question is a particularly difficult one. At the outset, assessing whether the definition is properly applied is critically hampered by the fact that the precise legal meaning of the OAU refugee definition is non-existent, and that comparative jurisprudence from other jurisdictions on the continent is not readily available.

¹⁹⁷ F Khan *Patterns and policies of migration in South Africa: Changing Patterns and the need for a comprehensive approach* Paper presented for conference on Patterns on Policies of Migration in Loreto, Italy, 3 October 2007 at 10. In this regard, see also Shacknove op cit n11 at 276, where the author states that an 'overly inclusive conception [of refugee] is also morally suspect and will, in addition, financially exhaust relief programmes and impugn the credibility of the refugee's privileged position among host populations, whose support is crucial for the viability of international assistance programs.'

¹⁹⁸ Okoth-Obbo op cit n5 at 113

Turning to South Africa's asylum determination procedure, one can conclude that, at first instance, the Department of Home Affairs' reliance on the OAU refugee definition in the form of a *prima facie* procedure based on *white lists* or *refugee generating countries* is an inadequate approach, in that it may include generalized and hence incorrect assumptions about what constitutes an OAU or section 3(b) event and a lack of appropriate consideration of the other elements of the definition. Additionally, as there is currently no mass influx situation in the country, such group determination violates the Refugees Act, which clearly provides for an individualised refugee status determination for each applicant. In examining only the objective conditions of a country, the RSDOs may also potentially disregard the subjective elements of an individual applicant's claim. In this regard, as van Beek states, 'a [refugee] determination procedure, which is only based on country information, neglects the fact that refugees also come from countries perceived to be safe...[and] violates the principle of non-discrimination, written down in the South African Constitution and the UN and OAU Conventions.'¹⁹⁹

With regard to South Africa's Refugee Appeal Board decisions, a more considered and measured approach to the application of the OAU or section 3(b) refugee definition has been observed. From the limited number of decisions reviewed, it appears as though the Appeal Board is faithfully applying its mind to the numerous interpretative issues raised by the OAU refugee definition, and that the Board's application of the expanded refugee definition is reasoned, although fairly limited or narrow in its scope. However, it may not be until such time as an Appeal Board's decisions involving its interpretation of the expanded refugee definition is challenged on judicial review to the High Court that more meaningful jurisprudence will develop in this regard.

In addition to reviewing the government's application of the OAU refugee definition in its asylum process in order to determine whether appropriate protection is being provided for, it is also relevant to examine whether or not the South African government is upholding the other key requirements of the OAU Convention. This is in order to determine whether, overall, South Africa is abiding by its legal obligations under the OAU Convention. In this regard, Article 2(1) the

¹⁹⁹ van Beek op cit n129 at 28

OAU Convention provides that member states shall 'use their best endeavours, consistent with their respective legislation, to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin.'²⁰⁰ Sub-article (4) of Article 2 additionally sets out the concept of burden-sharing amongst member states, in that if a member state finds 'difficulty in continuing to grant asylum to refugees, such state may appeal directly to other member states and through the OAU and such member states shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the member state granting asylum.'²⁰¹

In terms of these provisions, especially that of burden sharing, it is significant to note the following statistics regarding the relative numbers of refugees and asylum seekers in South Africa as compared to other much poorer and less developed African nations. While Africa contains approximately one quarter of the world's total refugee population,²⁰² South Africa only provides refuge to a relatively small percentage of the continent's total number. At the end of 2006, South Africa had 35,086 recognized refugees and a total of 131,107 pending asylum seeker applications.²⁰³ Even though in 2007 South Africa received more asylum seekers than any other country, with 53,400 new asylum claims lodged,²⁰⁴ the total number of persons protected in South Africa still remains relatively low. In contrast, at the end of 2006, Tanzania was providing protection to 485,295 refugees; Uganda was protecting 272,007 refugees and Kenya accommodating 272,531 refugees.²⁰⁵ These numbers, juxtaposed to the Department of Home Affairs' convictions that it is dealing with an overwhelming mass influx of asylum seekers, indicates an off-putting attitude of the South African government towards refugee protection, especially relative to other African countries. In addition, the ever-worsening

²⁰⁰ OAU Convention, Art II(1)

²⁰¹ OAU Convention, Art II(4)

²⁰² According to UNHCR's 2006 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, Division of Operational Services, Field Information and Coordination Support Section, June 2007, Revised 16 July 2007 accessed on 12 December 2007 at <http://www.unhcr.org/statistics/STATISTICS/4676a71d4.pdf> at 5, at the end of 2006, the refugee population in Africa was 2,421,300 out of a total world population at that time of 9,877,800.

²⁰³ Ibid at 18

²⁰⁴ Protecting Refugees and the Role of the UNHCR 2007-8 accessed on 12 December 2007 at <http://www.unhcr.org/basics/BASICS/4034b6a34.pdf> at 30.

²⁰⁵ UNHCR's 2006 Global Trends report op cit n*

conditions at the Department of Home Affairs Refugee Reception Offices²⁰⁶, including the frequently reported xenophobic attitudes of Home Affairs officials towards refugees and asylum seekers, indicates that 'best endeavours, consistent with their respective legislation, to receive refugees' are not necessarily being made.

Article 2(3) of the OAU Convention specifically prohibits the *refoulement* of refugees. It provides that 'no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.' This Article 'goes much farther than the comparable provision in the 1951 Convention,'²⁰⁷ in that it 'expressly prohibits, and thereby includes within the scope of its non-refoulement principle, rejection at the border.'²⁰⁸ This is another provision of the OAU Convention, which arguably the South African government is not wholly abiding by. According to J van Garderen of the Lawyers for Human Rights, in fact 'South Africa is following an exclusion policy, the outcome of which may inflate refugee numbers in other countries, in spite of her own comparatively small refugee population.'²⁰⁹ In this regard, South African refugee practice 'appears to hinge around the prevention of refugees from entering the country failing which everything possible should be done to ensure their exit.' More specifically, many reports confirm the extent to which South Africa deports migrants, many of which never get the opportunity to reach a refugee reception office to apply for asylum and hence may be subject to *re-foulement* to their countries of origin at the hands of South African officials. Such 'foreign migrants are liable to be arrested, detained, and deported in circumstances and under conditions that flout South Africa's own laws.'²¹⁰

²⁰⁶ In *Kiliko and others v Minister of Home Affairs and others* (2006 (4) SA 114 (C), at par 28 the court held that 'the Department of Home Affairs, by having failed since 2000 to introduce adequate and effective measures to address a gradually worsening situation, is primarily and materially responsible for the lack of reasonably adequate facilities essential for an expeditious handling of applications for asylum-seeker permits. The delays caused by such lack of facilities have, in my view, undoubtedly resulted in the violation of the fundamental rights of asylum seekers under the Constitution and also under the Refugees Act.'

²⁰⁷ Okoth Obbo op cit n5 at 88

²⁰⁸ Ibid at 88-89

²⁰⁹ Legal Resources Foundation report op cit n114 at 75

²¹⁰ Human Rights Watch Report 'Keep Your Head Down: Unprotected Migrants in South Africa' (February 2007) accessed at <http://hrw.org/reports/2007/southafrica0207/> on 7 February 2008 at 5

Given the above, this research concludes that, by and large, the South African government is a long way away from being able to claim adherence to all of the key provisions of the OAU Refugee Convention. In terms of its application of the OAU Convention's refugee definition, it would appear that Department of Home Affairs officials are not sufficiently trained to apply the definition properly and that the asylum process itself, given the significant pressures it faces, does not allow for this to take place. Specific training on the non-exclusive application of the section 3(b) refugee definition should be provided, as well as a concerted effort to promote the expansion of the concept of refugee protection to *all persons* who do not have individualized claims of persecution in their countries of origin.

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